

# A JAILHOUSE LAWYER'S MANUAL

## LOUISIANA STATE SUPPLEMENT



SUPPLEMENT TO THE 11TH EDITION

COLUMBIA HUMAN RIGHTS LAW REVIEW

# A Jailhouse Lawyer's Manual

Louisiana State Supplement  
To the Eleventh Edition

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## CHAPTER 1: YOUR RIGHT TO INFORMATION\*

### A. INTRODUCTION

This Chapter talks about laws that allow you to get access to information in Louisiana. Getting information can be important for several reasons. Getting information can help you file a complaint, request post-conviction relief, or contest things on your criminal record. Part B gives an overview of the rules of the discovery process. Part B looks at the rules of civil and criminal procedure. Part C describes Louisiana's Public Records Law, which grants access to many records held by state and local governments. Appendix A provides some sample forms as well as address and telephone information that might be useful to you.

### B. DISCOVERY

#### 1. Civil Discovery (LA CODE CIV. PROC. ANN. Book II, Title III, Chapter 3)

Chapter 7 of the *Jailhouse Lawyer's Manual* discusses how almost all states have adopted their own versions of rules to govern civil procedure within their jurisdiction (within their courts). These rules are often based on the Federal Rules of Civil Procedure and can even have the same language. However, this is not always the case—if your case is being filed in state court (instead of federal court), you should make sure to use the Louisiana Code of Civil Procedure.

This Chapter deals with the discovery process, or how the Plaintiff and Defendant disclose information about the case to each other. Discovery usually takes place in the earlier stages of the case, as you get more information about your case.<sup>1</sup> The civil discovery rules are in the Louisiana Code of Civil Procedure in Article 1420 through Article 1471.

##### a. Signing Document Requests

Article 1420 covers the signing of document requests (one of the main ways both parties get information about each other). If you are represented by an attorney, all of these requests (along with responses and objections to those requests) must be signed by at least one attorney who is in the court record and must also list his or her address. If you are not represented by an attorney, you must sign your own name on the discovery document (requests, responses, or objections) and also list your address.<sup>2</sup>

The signature is important because it represents a certification (promise) that you or your attorney have read the discovery request, response, or objection, and that to the best of your knowledge, based on reasonable inquiry (investigation), the document is (1) consistent with all the rules of discovery and existing law (or at least based on a good faith argument against existing law), (2) not used simply to harass the other party or delay litigation, and (3) that it is not unreasonably burdensome, or expensive, considering the issues at stake in the litigation.<sup>3</sup>

If the request, response, or objection is not signed, then it will be stricken and not valid, unless you sign it right after the issue is brought to your attention. Until it is signed, the other party does not have to respond to your request.<sup>4</sup>

If the court finds that you or your attorney signed the request and it violated the three issues discussed above (that it is not consistent with existing law, it was meant to harass the other side, or is unreasonably burdensome or expensive), the court can punish you or your attorney with a sanction

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\* This Supplement Chapter was written by Oscar Loui and Marshall Hogan.

<sup>1</sup> For more information about how the discovery phase fits in the overall timeline of your case, please consult Chapter 7 of the main *JLM*.

<sup>2</sup> LA. CODE CIV. PROC. ANN. art. 1420(A) (2017).

<sup>3</sup> LA. CODE CIV. PROC. ANN. art. 1420(B) (2017).

<sup>4</sup> LA. CODE CIV. PROC. ANN. art. 1420(C) (2017).



(penalty).<sup>5</sup> The court will then hold a hearing to determine whether the discovery request was improper,<sup>6</sup> and if it finds that it was, it could impose a sanction like paying the other party for the expenses they made because of your improper discovery request.<sup>7</sup>

b. Different Methods of Discovery

Article 1421 discusses the different methods of discovery you can use in your case. Different methods include depositions (where you meet and question a person in a room in front of a court reporter for testimonial use), written interrogatories (where you mail questions to the other side so that they can write back and respond), the production of documents (where you get copies of documents important to the case from the other party), permission to look at land or other property, physical and mental exams, requests for release of medical records, and also requests for admissions (written questions where you ask the other party to admit or deny certain facts). Unless the court says differently,<sup>8</sup> there is no limit on the number of times that you can use these different methods.<sup>9</sup> But there may be certain limits to the number of questions you can ask (such as if a witness for a deposition is only available for one day, or the length of an interrogatory), so avoid questions you already know the answer to and focus on important questions and things you want to learn more about.

Article 1427 also states that unless the court says otherwise, these different methods of discovery can be used in any order.<sup>10</sup> However, one party's discovery process (through depositions, production of documents, or other written requests) must not delay the other party's discovery process. If you think that a party is using discovery to delay your own discovery, you can file a motion in court to try to solve the problem.<sup>11</sup>

i. *Depositions*

Depositions are one of your most important discovery tools. Depositions can usually be used in one of two ways. First, depositions help to find out what the witness knows about the issues in your case. Second, it helps to preserve (record) a witness's testimony so that it can be used later on during trial and in pleading documents. Because testimony can be preserved through depositions, this method is really useful if you know that a witness cannot be there at trial (like if they are old, or live in a different state, etc.), but you still want to use what they say in your case.

After a lawsuit is filed, any party can take the testimony of any person (this includes a party to the lawsuit) through a deposition by oral examination.<sup>12</sup> If you are the plaintiff, you usually only need the permission of the court if you want to schedule the depositions within fifteen days of serving the other side with notice (telling the other side) that a lawsuit has been filed.<sup>13</sup> However, if the other party has already served you with a notice of deposition (told you that they're doing a deposition) or used other discovery procedures, you do not need the permission of the court to schedule the depositions, even if it is less than fifteen days after you served the other side with notice of the lawsuit.<sup>14</sup>

You also don't need permission from the court to schedule depositions if you give special notice that meets the requirements of Article 1439.<sup>15</sup> Under Article 1439, you must state on the notice that the witness

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<sup>5</sup> LA. CODE CIV. PROC. ANN. art. 1420(D) (2017).

<sup>6</sup> LA. CODE CIV. PROC. ANN. art. 1420(E) (2017).

<sup>7</sup> LA. CODE CIV. PROC. ANN. art. 1420(D) (2017).

<sup>8</sup> LA. CODE CIV. PROC. ANN. art. 1426 (2017). Upon motion by a party, and for good cause shown, the court may make protective orders to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

<sup>9</sup> LA. CODE CIV. PROC. ANN. art. 1421 (2017).

<sup>10</sup> LA. CODE CIV. PROC. ANN. art. 1427 (2017).

<sup>11</sup> LA. CODE CIV. PROC. ANN. art. 1427 (2017).

<sup>12</sup> LA. CODE CIV. PROC. ANN. art. 1437 (2017).

<sup>13</sup> LA. CODE CIV. PROC. ANN. art. 1437 (2017).

<sup>14</sup> LA. CODE CIV. PROC. ANN. art. 1437 (2017).

<sup>15</sup> LA. CODE CIV. PROC. ANN. art. 1437 (2017).

is about to leave the state and can't be examined before the end of the fifteen-day period (along with facts to support this). Since you are the plaintiff in the situation (waiting for the fifteen-day period to expire), your attorney will sign the special notice and certify that he or she believes that those statements and the supporting facts are true.<sup>16</sup> If a party is able to show that when he was served with this special notice he was unable, after the exercise of diligence (tried to), to find a lawyer to represent him at the deposition, that deposition cannot be used against him.<sup>17</sup>

In order to get a witness (who is now called a "deponent") to show up to the deposition, you can serve a subpoena on them, like you would do with a witness for trial. For witnesses that are currently in jail, you can only take their deposition if you are first granted permission by the court and follow the rules that the court makes.<sup>18</sup>

When you hold a deposition, you usually need to have the question and answer session in front of a person who has been authorized (allowed) to administer oaths (most commonly a court reporter), so that the statements the witness says count as sworn testimony. However, that person cannot be an employee or an attorney that represents an interested party in the case. As a result, according to Article 1434, which defines employee as including court reporters that have a contract with a reporter or a law firm that is involved with the case, some other court reporter or party must serve as an officer for the deposition.<sup>19</sup>

If the witness and deposition are in a different state from the one where the lawsuit is filed, the deposition process must follow the laws of the witness's state about the mandatory process requiring a person to show up and deliver testimony. For all other aspects of the deposition, the Articles of the Louisiana Code of Civil Procedure still apply.<sup>20</sup>

Parties can change the time, place, and procedure of depositions as long as they agree upon these terms in writing (referred to as written stipulations). You should follow these terms unless the court or Article 1425 prohibits the terms. A Louisiana resident can only be required to attend a deposition in his parish or at his workplace (or a place determined by the court), though both parties usually will be able to find a convenient place to meet (usually at the offices of a law firm). Also, a non-Louisiana resident can only be required to take his deposition in the parish where he was served with the subpoena (or where the court decides), but both parties can usually agree to a more convenient location instead.<sup>21</sup>

During a deposition, if the deponent (person answering questions) or a party feels like the deposition is being conducted in bad faith or is being used unreasonably to annoy, embarrass, or oppress the deponent or party, the court can make the officer in charge of the deposition stop the deposition, or it can limit the scope and manner of the deposition (what and how questions are asked or answered).<sup>22</sup> When this issue comes up, the deposition will be suspended (stopped) until that party can take the issue to a court.<sup>23</sup> If the court terminates (ends) the deposition, it can only be started again with permission from the court.<sup>24</sup>

## ii. *Perpetuation of Testimony (Recording What Someone Says)*

For special cases where a lawsuit has not been filed yet (you have a proper case to go to court, but have not done so yet), you can also preserve testimony ahead of time (whether your own or someone else's) through the "perpetuation of testimony" process in Article 1429 (record testimony for later). If this is the case, you should file a petition with the court showing that (1) you expect to be a party to litigation in a

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<sup>16</sup> LA. CODE CIV. PROC. ANN. art. 1437 (2017). The attorney's certification is subject to sanctions provided by Articles 863 and 864.

<sup>17</sup> LA. CODE CIV. PROC. ANN. art. 1439 (2017).

<sup>18</sup> LA. CODE CIV. PROC. ANN. art. 1437 (2017).

<sup>19</sup> LA. CODE CIV. PROC. ANN. art. 1434(2) (2017). But it does not disqualify court reporters that are contracted by federal, state, or local governments, and the subdivisions thereof, or parties in proper person.

<sup>20</sup> LA. CODE CIV. PROC. ANN. art. 1435 (2017).

<sup>21</sup> LA. CODE CIV. PROC. ANN. art. 1436 (2017).

<sup>22</sup> LA. CODE CIV. PROC. ANN. art. 1444 (2017).

<sup>23</sup> LA. CODE CIV. PROC. ANN. art. 1444 (2017).

<sup>24</sup> LA. CODE CIV. PROC. ANN. art. 1444 (2017).

court of that state, but are currently unable to bring the lawsuit or cause it to be brought, (2) the subject matter of the future suit and your interest in it, (3) the facts you want to be established by this testimony and why you want the testimony, (4) the names or a description of the people you expect will be against you (adverse parties), along with their known addresses, and (5) the names and addresses of the people you are trying to get testimony from, and that you plan to ask the court for an order giving you permission to take their depositions.<sup>25</sup>

After filling out the form, you then serve a notice (at least twenty days before the hearing date)<sup>26</sup> on each person you have named as an expected adverse party against you. A notice lets someone know that you've sued them. You must give them a copy of your petition as well. If you can't reach all the expected adverse parties, the court might rule that it is okay to publish a notice in the newspaper or to provide notice by some other method. The court may also have an attorney to represent those absent people at the deposition so that he or she can cross-examine the witness too. Furthermore, if one of the expected adverse parties is a minor or is incompetent, the court will also appoint an attorney to represent them at the deposition.<sup>27</sup>

### iii. *Experts*

Experts are often used during the discovery process and can provide valuable testimony for use at trial. Article 1425 covers the process for discovery for experts. For example, you can require the other party to tell you who they expect to call at trial (and this can be done through interrogatories or by deposition), to tell you about what the expert will testify to, and to share basic facts that the expert will talk about.<sup>28</sup>

If an expert has been retained or employed (hired) by another party, but is not expected to be at trial, you can discover facts he or she knows only if you can show that there are exceptional circumstances that make it impracticable (hard) to find out those facts any other way.<sup>29</sup>

Unless “manifest injustice” (lots of unfairness) would result, each party is usually required to pay experts they hire a reasonable fee for the time they spend answering discovery requests.<sup>30</sup> For the type of discovery that falls under paragraph (2) of the Article (an expert not expected to be at trial, but knows something that is hard to find out some other way), the court could require the party seeking that information to pay for that expert's time, even if not hired by them.<sup>31</sup>

### iv. *Interrogatories*

Interrogatories are written requests to the other party to provide information about questions you ask. Article 1457 allows you to serve any party with a written interrogatory at any time after you file the lawsuit (you can even give it with your complaint, the first document to start your lawsuit) without permission from the court. If the party you're serving is a corporation, partnership, association, or governmental agency, a representative officer or agent will be able to provide information for them.<sup>32</sup>

Written interrogatories have limits. Article 1457(b) limits you to thirty-five written interrogatories. To get more, you need to ask the court. This limit covers the entire length of your case. If you need more interrogatories, you can be allowed thirty-five more, but you have to ask the court (by filing an “*ex parte* motion,” which is a motion where the court only hears from one party). If you need more than thirty-five

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<sup>25</sup> LA. CODE CIV. PROC. ANN. art. 1429 (2017).

<sup>26</sup> LA. CODE CIV. PROC. ANN. arts. 1314, 1430 (2017).

<sup>27</sup> LA. CODE CIV. PROC. ANN. art. 1430 (2017).

<sup>28</sup> LA. CODE CIV. PROC. ANN. arts. 1425(A)–(B) (2017).

<sup>29</sup> LA. CODE CIV. PROC. ANN. art. 1425(D)(2) (2017). There is also a method to obtain facts in a physician's examination report that is set forth in Article 1465.

<sup>30</sup> LA. CODE CIV. PROC. ANN. art. 1425(D)(3) (2017).

<sup>31</sup> LA. CODE CIV. PROC. ANN. art. 1425(D)(3) (2017).

<sup>32</sup> LA. CODE CIV. PROC. ANN. art. 1457(A) (2017).

written interrogatories, you must ask the court and tell the court the good reasons why you need more interrogatories.<sup>33</sup>

When you get an interrogatory, you have to answer each and every one separately and fully in writing and under oath. You must answer the questions unless you object to the question.<sup>34</sup> If you have an objection, you must write down your objection instead of an answer. After you respond, you must sign the document and return a copy of the document within fifteen days after you received it.<sup>35</sup> If you serve a defendant with interrogatories when you first file your lawsuit, they have thirty days to respond. If the party is a state or a political subdivision, they also have thirty days to respond.<sup>36</sup> The court can change this time limit.<sup>37</sup> If the other side objects or doesn't answer an interrogatory, a party can ask a court to make that side give discovery to get those answers.<sup>38</sup> This method is discussed in in Subsection B(1)(c), which covers compelling discovery.

Interrogatories can ask questions about anything permitted in Articles 1422 through 1425 (for more information, look to Section B(2), which covers the scope of discovery). Interrogatories may ask about any fact important to issues or defenses in your case.<sup>39</sup> The answers you receive from other parties can then be used at trial, as long as they do not conflict with any rules of evidence.<sup>40</sup>

#### v. *Production/Subpoenas*

Article 1461 covers the production of documents (which include writings, drawings, graphs, charts, photographs, and other data compilation) along with getting permission to go on land or property to inspect, photograph, test, or sample the property or objects on it.<sup>41</sup> These requests are often referred to as subpoenas (which make a person show up and do something). A subpoena can be issued to have someone show up to a deposition. A “*subpoena duces tecum*” specifically refers to having a party show up to bring documents. Sometimes, they can be combined to have someone show up to answer questions in person and bring documents they have at the same time. Article 1463 notes that if these requests are related to a deposition, the rules covering depositions also apply.<sup>42</sup>

You can give this request to any party, as long as it is relevant (matters for your case) (again, look at Articles 1422 through 1425) and the party you serve has the documents in their possession, custody, or control.<sup>43</sup> Article 1462 states that Articles 1461 and 1462 do not prevent you from serving an independent party (who isn't directly involved in the litigation as a party) with a request for the production of documents or permission to inspect or enter land.<sup>44</sup>

You do not need the permission of the court to serve these requests on parties, but each request must have a list of the exact items you want to look at or get. Each item should have a description or category with a reasonable amount of detail. The request should also include a reasonable time, place, and manner for the inspection or getting the documents.<sup>45</sup> If you serve a *subpoena duces tecum* on a person or group that is not a party to the lawsuit, you must follow the same rules and provide a reasonably accurate description of the items or documents that you want to get or look at.<sup>46</sup> You must also give reasonable notice to the other

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<sup>33</sup> LA. CODE CIV. PROC. ANN. art. 1457(B) (2017). Note that local rules of court may provide a greater restriction on the number of written interrogatories.

<sup>34</sup> LA. CODE CIV. PROC. ANN. art. 1458 (2017).

<sup>35</sup> LA. CODE CIV. PROC. ANN. art. 1458 (2017).

<sup>36</sup> LA. CODE CIV. PROC. ANN. art. 1458 (2017).

<sup>37</sup> LA. CODE CIV. PROC. ANN. art. 1458 (2017).

<sup>38</sup> LA. CODE CIV. PROC. ANN. art. 1458 (2017).

<sup>39</sup> LA. CODE CIV. PROC. ANN. arts. 1422–1425 (2017).

<sup>40</sup> LA. CODE CIV. PROC. ANN. art. 1459 (2017).

<sup>41</sup> LA. CODE CIV. PROC. ANN. art. 1461 (2017).

<sup>42</sup> LA. CODE CIV. PROC. ANN. art. 1463(B) (2017).

<sup>43</sup> LA. CODE CIV. PROC. ANN. art. 1461 (2017).

<sup>44</sup> LA. CODE CIV. PROC. ANN. art. 1462(A) (2017).

<sup>45</sup> LA. CODE CIV. PROC. ANN. art. 1461(A) (2017).

<sup>46</sup> LA. CODE CIV. PROC. ANN. art. 1462(A) (2017).

parties in the lawsuit about when the production or inspection will take place. Last, you must figure out a reasonable time, place, and manner for all parties in the case to meet and copy those documents.<sup>47</sup>

Each party has fifteen days to respond in a written document. However, a defendant has thirty days to respond if the production request was made when the lawsuit was first filed. The court can change these time limits. For each individual item, a party's response must state whether they agree to give you the documents, allow you to inspect something, or whether they disagree because of some objection. If a responding party objects, they also must state the reasons for that objection (for each individual item they object to).<sup>48</sup> Again, if a party believes that there is no real objection or didn't get a response to a production request, that party can seek to compel (force) discovery under Article 1469.<sup>49</sup>

If the party agrees to produce the documents, they should give them to you the same way as they are kept in the usual course of business, or they should organize and label them to match the different categories that were included the original production request.<sup>50</sup>

vi. *Supplementation of Responses (Updating Answers)*

Sometimes new information is discovered or comes to light after you have responded to a discovery request. However, Article 1428 states that a party is under no obligation to supplement (update) his previous response (answer) if it was complete at the time he or she made the response. There are three exceptions to this rule. First, you must update your answers to questions about the identity and location of people who know about discoverable issues. You also must update answers about the identity, knowledge, and the probable substance of testimony (what the expert will say) for any experts you plan to call at trial.<sup>51</sup> Second, you must supplement your response if you get information that makes you realize your last answer was incorrect when you made it, or the new information means that your answer is no longer true and that a failure to change it would result in a "knowing concealment."<sup>52</sup> Third, a court can make you update your answer, you can agree with the other parties to update your answers, or you can request updates for past responses (any time before trial).<sup>53</sup>

vii. *Physical and Mental Examinations of Persons*

You can get discovery by the physical or mental examination of people. This type of discovery is covered by Article 1464. When the mental or physical condition of a party, or a person under the legal control of a party, is in dispute or at issue in the case, the court can make that person take a physical or mental examination from a physician.<sup>54</sup> The court can also issue an order to make a party take an exam by a vocational rehabilitation expert or a licensed clinical psychologist, as long as the party has given notice of their intent to use that kind of expert. To do this, you must make a motion to the court based on a showing of good cause (that you have a good reason), and also give notice to the person you want to examine. You must also list the person you wish to examine as well as the time, place, manner, conditions, and scope of the examination to all of the parties involved in the litigation.<sup>55</sup>

Upon request by the other parties, the party who wanted to have the examination has to share a copy of the examining physician's detailed written report. This report will explain all of his or her findings. This report should include the results of all the different tests conducted, diagnoses, and conclusions, along with earlier exams of the same condition.<sup>56</sup>

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<sup>47</sup> LA. CODE CIV. PROC. ANN. art. 1462(A) (2017).

<sup>48</sup> LA. CODE CIV. PROC. ANN. art. 1462(B)(1) (2017).

<sup>49</sup> LA. CODE CIV. PROC. ANN. art. 1462(B)(1) (2017).

<sup>50</sup> LA. CODE CIV. PROC. ANN. art. 1462(C) (2017).

<sup>51</sup> LA. CODE CIV. PROC. ANN. art. 1428 (2017).

<sup>52</sup> LA. CODE CIV. PROC. ANN. art. 1428 (2017).

<sup>53</sup> LA. CODE CIV. PROC. ANN. art. 1428 (2017).

<sup>54</sup> LA. CODE CIV. PROC. ANN. art. 1464 (2017).

<sup>55</sup> LA. CODE CIV. PROC. ANN. art. 1464 (2017).

<sup>56</sup> LA. CODE CIV. PROC. ANN. art. 1464 (2017).

After giving that report to the other parties, the party who asked for the exam can get earlier reports of exams on the same physical or mental condition, unless it can be shown that the person cannot obtain it. If that is the case, the court can compel the production of (make someone give) that report, and if a physician doesn't give it over, the court can choose to exclude (not allow) his or her testimony at trial.<sup>57</sup>

If the person who was examined asks for and gets a report of that physical or mental exam, or takes the deposition of the examiner, he or she waives any privilege (ability to not testify) they might have (in the lawsuit and related matters) about the testimony of physicians who may later examine them in the future.<sup>58</sup>

Finally, these rules apply to the exams which are conducted by agreement of the parties (unless that agreement says differently). Other methods of discovery that concern a physical or mental exam (like a deposition or production of documents) will be governed by those rules.<sup>59</sup>

#### viii. *Requests for Admissions*

Another useful method of discovery is a request for admissions. Article 1466 covers requests for admissions. Any party can serve a written request on another party. This request helps determine the truth of certain relevant (important) facts in the case (any relevant issue within the scope of Articles 1422 through 1425).<sup>60</sup> The responding party usually must either admit (fully or in part), deny (fully or in part), or say that they don't know about the fact.<sup>61</sup> You can also attach copies of documents with this request and ask questions about the authenticity of the documents (whether the documents are what someone says they are). These requests can be sent without asking the court and can be made any time after the lawsuit has been filed.<sup>62</sup>

#### c. Compelling Discovery (Forcing Discovery)

If a party doesn't respond to any method of discovery, you can ask the court compel (force) discovery from that party (make someone turn over information). Article 1469 states that after reasonable notice to the other parties and other relevant people, you can ask for an order (regarding a party to the lawsuit or a deponent who is not a party) to force discovery in the court where you've filed your lawsuit.<sup>63</sup> You can do this in several situations: (1) if either a deponent doesn't answer a question asked through Articles 1437 or 1448;<sup>64</sup> (2) if a corporation fails to designate a representative (choose someone) to respond or show up to a deposition under Articles 1442 and 1448;<sup>65</sup> (3) if a party doesn't answer an interrogatory filed under Article 1457;<sup>66</sup> (4) if a party doesn't respond to a request for inspection filed under Article 1461.<sup>67</sup> With private medical and financial records, you will not be able to compel disclosure unless you meet certain exceptions.<sup>68</sup> An "evasive or incomplete answer" (when you don't answer the whole question) is also considered a failure to answer.<sup>69</sup> In those situations, a court can make a party answer or let you look at something.<sup>70</sup> With a deposition, you can finish up the rest of your deposition or adjourn the examination before you ask the court to do this.<sup>71</sup> If the court denies some or all of your motion (request), it can issue a protective order. A protective order will prevent you from getting discovery under Article 1426 (which has the rules for protective orders). After holding a hearing for both sides, the court can require you to pay reasonable costs

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<sup>57</sup> LA. CODE CIV. PROC. ANN. art. 1465(A) (2017).

<sup>58</sup> LA. CODE CIV. PROC. ANN. art. 1465(B) (2017).

<sup>59</sup> LA. CODE CIV. PROC. ANN. art. 1465(C) (2017).

<sup>60</sup> LA. CODE CIV. PROC. ANN. art. 1466 (2017).

<sup>61</sup> LA. CODE CIV. PROC. ANN. art. 1467(A) (2017).

<sup>62</sup> LA. CODE CIV. PROC. ANN. art. 1467(B) (2017).

<sup>63</sup> LA. CODE CIV. PROC. ANN. art. 1469(1) (2017).

<sup>64</sup> LA. CODE CIV. PROC. ANN. art. 1469(2) (2017).

<sup>65</sup> LA. CODE CIV. PROC. ANN. art. 1469(2) (2017).

<sup>66</sup> LA. CODE CIV. PROC. ANN. art. 1469(2) (2017).

<sup>67</sup> LA. CODE CIV. PROC. ANN. art. 1469(2) (2017).

<sup>68</sup> See LA. CODE CIV. PROC. ANN. arts. 1469.1, 1469.2 (2017).

<sup>69</sup> LA. CODE CIV. PROC. ANN. art. 1469(3) (2017).

<sup>70</sup> LA. CODE CIV. PROC. ANN. art. 1469(2) (2017).

<sup>71</sup> LA. CODE CIV. PROC. ANN. art. 1469(2) (2017).

made in opposing the motion, unless your motion was substantially justified (good reason for making your motion) or if it would be unfair.<sup>72</sup>

If the motion is granted, then there will be the same opportunity for hearing both sides. The court can then require the party or deponent (person being asked and answering questions) to pay you for reasonable costs made in getting the court to force discovery, unless the court finds that the opposition to the motion was substantially justified or that forced payment would be unfair.<sup>73</sup>

If the court grants some, but not all of your motion, the court can split reasonable expenses among both parties in a just manner.<sup>74</sup>

After the court issues an order forcing discovery, and a party or deponent still refuses to respond, the court can do several things.<sup>75</sup> A court can: (1) treat something the party is against disclosing as a fact for the lawsuit<sup>76</sup> (a fact that will benefit you), (2) not allow the party to support or oppose specific claims or defenses, or prohibit him from introducing certain things into evidence,<sup>77</sup> (3) strike out or even dismiss pleadings or certain parts of it,<sup>78</sup> (4) pause the proceedings until the order is obeyed,<sup>79</sup> (5) give a judgment by default against the disobedient party,<sup>80</sup> and (6) find the party in contempt of court (except for physical or mental exams).<sup>81</sup>

Except for exceptional circumstances, a court cannot impose sanctions on (penalize) a party for not giving electronically stored information that was lost as a result of the “routine, good-faith operation of an electronic information system.”<sup>82</sup>

Instead of or in addition to these orders, the court can make the party that didn't follow the rules pay the reasonable expenses, including attorney's fees, which were caused by the failure, unless the court finds that the failure was substantially justified or that it would be unfair to force payment.<sup>83</sup>

## 2. The Scope of Civil Discovery

Article 1422 covers the scope of discovery procedure, or how broad your requests and searches can be. The Article states that you can get discovery on any matter that is not privileged and that is relevant to the case, whether that matter is what a party is claiming or what a party is using as a defense.<sup>84</sup> This can include information about the existence or location of any books, documents, or people that know about issues in the case.<sup>85</sup> A party cannot object to giving this information only because it will be inadmissible at trial later. If the requested information seems to be reasonably calculated to lead to the discovery of admissible evidence (if it seems like you want it to get other admissible evidence), it should be allowed, unless there are other kinds of objections.<sup>86</sup> A common objection may be that the questions being asked (through an interrogatory or at a deposition) are not relevant (important) to the case, or not likely to lead to the discovery of any relevant evidence.

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<sup>72</sup> LA. CODE CIV. PROC. ANN. art. 1469(4) (2017).

<sup>73</sup> LA. CODE CIV. PROC. ANN. art. 1469(4) (2017).

<sup>74</sup> LA. CODE CIV. PROC. ANN. art. 1469(4) (2017).

<sup>75</sup> LA. CODE CIV. PROC. ANN. art. 1471(A) (2017).

<sup>76</sup> LA. CODE CIV. PROC. ANN. art. 1471(A)(1) (2017).

<sup>77</sup> LA. CODE CIV. PROC. ANN. art. 1471(A)(2) (2017).

<sup>78</sup> LA. CODE CIV. PROC. ANN. art. 1471(A)(3) (2017).

<sup>79</sup> LA. CODE CIV. PROC. ANN. art. 1471(A)(3) (2017).

<sup>80</sup> LA. CODE CIV. PROC. ANN. art. 1471(A)(3) (2017).

<sup>81</sup> LA. CODE CIV. PROC. ANN. art. 1471(A)(4) (2017).

<sup>82</sup> LA. CODE CIV. PROC. ANN. art. 1471(B) (2017).

<sup>83</sup> LA. CODE CIV. PROC. ANN. art. 1471(C) (2017).

<sup>84</sup> LA. CODE CIV. PROC. ANN. art. 1422 (2017).

<sup>85</sup> LA. CODE CIV. PROC. ANN. art. 1422 (2017).

<sup>86</sup> LA. CODE CIV. PROC. ANN. art. 1422 (2017).

a. Insurance Agreements

Any party can get discovery about an insurance agreement. A party can get discovery about the existence and contents (what it says) of that insurance agreement, if the agreement may satisfy all or part of a judgment, or serve to indemnify a party in the lawsuit (to save harmless; to secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss). An agreement will satisfy all or part of a judgment or will serve to indemnify if the agreement says it will cover some or all costs in case of a loss in court.<sup>87</sup>

b. Trial Preparation Materials

Article 1424 covers discovery about trial preparation materials. A court cannot order the production or inspection of (make the other side give you) any writing that was obtained by an adverse party, their attorney, or some other agent that was prepared for trial. The only exception is when not producing it will unfairly prejudice the party asking for the discovery or cause him or her injustice.<sup>88</sup> Except for Article 1425(E)(1) (which allows for the discovery of records of testifying experts about the mental impressions, opinions, or trials strategies of the attorney hiring the expert in exceptional circumstances),<sup>89</sup> no documents that cover either party's attorneys' mental impressions, conclusions, opinions, or theories can be discovered.<sup>90</sup>

c. Statements of Parties

A person can also get, without the permission of the court, any statement concerning the litigation or its subject matter that was previously made by that party (whether that be a written statement or a recorded copy of an oral statement).<sup>91</sup>

d. Privilege

When a party withholds (doesn't give) information from discovery under a claim of privilege or that it includes trial preparation material, that party must make that claim explicitly (clearly) and has to describe the documents, communications, or things that will not be produced (given over) in a manner that does not reveal the protected information, but will also allow the other side to decide whether the information is actually covered by the privilege.<sup>92</sup> Privilege means that a party doesn't have to turn information over because information came from a special relationship, for example, the attorney-client relationship. For other relationships in which privilege might apply, *see* LA. CODE EVID. ANN. arts. 501–519 (2017).

If a party accidentally turns over some information covered by the attorney-client privilege, the privilege will not be waived if the party didn't mean to turn over the information and turned the information over as part of litigation or administrative proceedings.<sup>93</sup> That party must also have taken reasonably prompt measures (acted quickly) to tell the other parties of the accident and try to put the material back under protection.<sup>94</sup> A party which has been notified of this must either return the documents or information or must promptly safeguard the covered material (though they do have the option to assert that there has been a waiver of privilege, so that the information is no longer protected).<sup>95</sup> These actions must also be taken if the other party receives the material and it is clearly privileged or accidentally produced, even without

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<sup>87</sup> LA. CODE CIV. PROC. ANN. art. 1423 (2017).

<sup>88</sup> LA. CODE CIV. PROC. ANN. art. 1424(A) (2017).

<sup>89</sup> LA. CODE CIV. PROC. ANN. art. 1425(E)(1) (2017).

<sup>90</sup> LA. CODE CIV. PROC. ANN. art. 1424(A) (2017).

<sup>91</sup> LA. CODE CIV. PROC. ANN. art. 1424(B) (2017).

<sup>92</sup> LA. CODE CIV. PROC. ANN. art. 1424(C) (2017).

<sup>93</sup> LA. CODE CIV. PROC. ANN. art. 1424(D) (2017).

<sup>94</sup> LA. CODE CIV. PROC. ANN. art. 1424(D) (2017).

<sup>95</sup> LA. CODE CIV. PROC. ANN. art. 1424(D) (2017).



notice by the original party (but still also has the option of asserting that there has been waiver of privilege).<sup>96</sup>

e. Experts

Article 1425 covers the scope of discovery for experts and pre-trial disclosures. A party may require any other party to name each person who might be used at trial to present evidence through interrogatories or by a deposition.<sup>97</sup> Upon motion by a party, or on the court's own, the court can require each party's experts to file a written report that contains their opinions, the basis and reasons for those opinions, along with any other data or information (which can be attached as exhibits). The report may also include the qualifications of the witness, their publications, the amount of compensation to be paid for their study, and a list of any other cases where the expert has testified at trial in the last four years.<sup>98</sup> These reports can be made at times and deadlines set by the court.<sup>99</sup> If there is no agreement or timetable set, these expert reports should be made at least ninety days before trial starts, or if the evidence is only to challenge another expert's report and their facts, within thirty days after disclosure by the other party.<sup>100</sup> Parties can also add to or supplement these reports when required to under Article 1428 (covered in the "supplementation of responses" subsection above).<sup>101</sup>

Usually, a party can use interrogatories, depositions, and document requests to discover the facts, knowledge, and opinions of another party's expert who will testify at trial. However, drafts of expert reports and communications between the expert and lawyer cannot be discovered (given to you) unless you show that there is no other way to get those facts or opinions.<sup>102</sup> If the parties want to issue an expert's report, the deposition will not happen until after the report has been issued.<sup>103</sup> If the expert has been hired by a party, but is not expected to be used at trial, a party can discover facts, opinions, and knowledge held by them only in exceptional (rare) circumstances (like showing it would be very hard or impractical to get that information any other way).<sup>104</sup> Unless manifest injustice would result, the court can also order the party seeking discovery from this expert to pay a reasonable fee for the time spent by these experts in responding to this additional discovery.<sup>105</sup>

If you feel that an expert is not qualified or that the data or methods are not reliable, you can also file a motion for a pretrial hearing to determine these questions.<sup>106</sup> If you do so, the motion must be filed at least sixty days before trial and must state sufficient (enough) information to show that he or she might not be qualified or might have used unreliable data or methods.<sup>107</sup> The court will then hold a hearing for both sides and rule on the motion at least thirty days before trial.<sup>108</sup> The court will then either tell you out loud the result and the reasons for the decision or will write down the result and state its decision and reasons.<sup>109</sup>

### 3. Criminal Discovery (LA. CODE CRIM. PROC. ANN. Title XXIV, Chapter 5)

In criminal cases, the discovery process and ways to get discovery are really different than in the civil system. Discovery is more focused, since you are dealing with the government's case against you instead of a civil party. This process is strictly regulated by the Louisiana Code of Criminal Procedure. Also, you must make a motion get access to all this information. So, it is important to know what rights you have (if you do not make a motion, the government doesn't have to give you a lot of information).

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<sup>96</sup> LA. CODE CIV. PROC. ANN. art. 1424(D) (2017).

<sup>97</sup> LA. CODE CIV. PROC. ANN. art. 1425(A) (2017).

<sup>98</sup> LA. CODE CIV. PROC. ANN. art. 1425(B) (2017).

<sup>99</sup> LA. CODE CIV. PROC. ANN. art. 1425(C) (2017).

<sup>100</sup> LA. CODE CIV. PROC. ANN. art. 1425(C) (2017).

<sup>101</sup> LA. CODE CIV. PROC. ANN. art. 1425(C) (2017).

<sup>102</sup> LA. CODE CIV. PROC. ANN. art. 1425(D)(1) (2017).

<sup>103</sup> LA. CODE CIV. PROC. ANN. art. 1425(D)(1) (2017).

<sup>104</sup> LA. CODE CIV. PROC. ANN. art. 1425(D)(2) (2017).

<sup>105</sup> LA. CODE CIV. PROC. ANN. art. 1425(D)(3) (2017).

<sup>106</sup> LA. CODE CIV. PROC. ANN. art. 1425 (F)(1) (2017).

<sup>107</sup> LA. CODE CIV. PROC. ANN. art. 1425(F)(1) (2017).

<sup>108</sup> LA. CODE CIV. PROC. ANN. art. 1425(F)(2) (2017).

<sup>109</sup> LA. CODE CIV. PROC. ANN. art. 1425(F)(3) (2017).

a. Discovery by the Defendant

i. *Statements by the Defendants*

Article 716 allows you, after making a motion, to get records and copies of statements that you made. These statements can include any written statements or recorded confessions, testimony before a grand jury, or any statements you made that are in the possession, control, or knowledge of the district attorney.<sup>110</sup> After making a motion, the court can order the district attorney to tell you about any oral confession or statement that exists and that he or she intends to use as evidence during the trial.<sup>111</sup> The district attorney does not have to tell you about the contents of the statement. The district attorney also has to give you information about when, where, and to whom the oral confession or statement was made.<sup>112</sup> Finally, Article 716(C) allows you, after a motion, to learn from the district attorney the substance of any oral statement that you made in response to interrogation (either before or after arrest) by any one that you knew to be a law enforcement officer.<sup>113</sup>

ii. *Defendant's Prior Criminal Record*

You can make a motion and get from the district attorney (or appropriate law enforcement agency) a copy of any record of your criminal arrests or convictions that they either possess or have in their custody.<sup>114</sup>

iii. *Documents and Tangible Objects*

You can make a motion to (ask) the court to make the district attorney let you inspect, copy, examine, test scientifically, photograph, or reproduce certain documents or tangible things that are in possession, custody or control of the state. However, only certain categories of documents can be inspected and reproduced: (1) documents which are intended for use by the state as evidence at the trial<sup>115</sup> (2) and documents that were from or belong to you, the defendant.<sup>116</sup> Lastly, certain state reports and documents covered by Article 723(A) cannot be disclosed. If the materiality or relevance (importance) of certain documents is questionable or in dispute, the court may examine the document through *in camera* inspection (private inspection in the judge's room) to determine whether they should be turned over to you.<sup>117</sup> The prosecution may not suppress exculpatory evidence (evidence favorable to the defendant in a criminal trial that exonerates or tends to exonerate the defendant of guilt) that would tend to show that you are not guilty under the *Brady* federal standard.<sup>118</sup>

iv. *Reports of Examinations and Tests*

You can also make a motion to have the court order the district attorney to let you inspect or reproduce the results or reports of any physical or mental exams or of scientific tests or experiments that

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<sup>110</sup> LA. CODE CRIM. PROC. ANN. art. 716(A) (2017).

<sup>111</sup> LA. CODE CRIM. PROC. ANN. art. 716(B) (2017).

<sup>112</sup> LA. CODE CRIM. PROC. ANN. art. 716(B) (2017).

<sup>113</sup> LA. CODE CRIM. PROC. ANN. art. 716(C) (2017).

<sup>114</sup> LA. CODE CRIM. PROC. ANN. art. 717(A) (2017).

<sup>115</sup> LA. CODE CRIM. PROC. ANN. art. 718 (2017).

<sup>116</sup> LA. CODE CRIM. PROC. ANN. art. 718 (2017).

<sup>117</sup> LA. CODE CRIM. PROC. ANN. art. 718 (2017).

<sup>118</sup> LA. CODE CRIM. PROC. ANN. art. 723(B) (2017); *see also* State v. Anthony, 97-91, p. 5 (La. App. 3 Cir. 6/4/97); 695 So. 2d 1142, 1144 (holding that under *Brady*, due process is violated by suppression of favorable evidence by prosecution when production of such evidence is requested and when evidence is material to guilt or innocence of accused, regardless of good or bad faith of prosecution); State v. Turner, 626 So. 2d 890, 896 (La. App. 3 Cir. 1993) (holding that the defendant did in fact make an adequately specific request for statements of exculpatory information in his motion for discovery, where he requested copies of any favorable or exculpatory material relevant to issue of his guilt or punishment including statements, whether made by victim, codefendant, former codefendant, arrestee or witness, and for all *Brady* and *Giglio* material).

are relevant to your case, that are in the possession, control, or knowledge of the district attorney, and that he or she intends to use at trial. However, any exculpatory evidence (which is favorable to you and tends to clear you of guilt) that the district attorney has or knows about must be provided to you, even if the district attorney does not intend to use it at trial.<sup>119</sup>

In addition, after a motion, whenever you are ordered to provide urine, blood, saliva, hair samples, or other bodily substances for DNA testing, you can also hold on to half of the DNA sample to test it yourself (at your own expense).<sup>120</sup>

#### v. *Evidence of Other Crimes*

After you make a motion, you can also have the court issue an order to have the district attorney tell you whether the government wants to use evidence of other crimes that you may have committed or were charged with (if that evidence is admissible under Article 404 and Article 412.2 of the Louisiana Code of Evidence).<sup>121</sup> However, the district attorney is not required to tell you of his or her intent to use evidence of other crimes, if it relates to conduct that forms an “integral part of the act or transaction” that you are currently being charged with. The district attorney doesn’t have to tell you of plans to use evidence about other crimes you have already been convicted of.<sup>122</sup>

#### vi. *Statements of Co-conspirators*

After a motion, you can also get an order to have the district attorney tell you about whether the government wants to use statements of co-conspirators (which is allowed under Louisiana Code of Evidence Article 801(D)(3)(b)) in the case.<sup>123</sup>

#### vii. *Confessions and Inculpatory Statements of Co-defendants*

After making a motion, the court can order the district attorney to give you access to any relevant written or recorded confessions or inculpatory statements (that tend to show you are guilty) which have been made by a co-defendant<sup>124</sup> and are intended to be used at trial. Again, however, exculpatory evidence (which tends to show you are not guilty of the charges) must be given to you under Article 722 even if the district attorney does not intend to use it at trial.<sup>125</sup>

#### viii. *State Reports and Other Matters Not Subject to Disclosure*

Except for the methods of getting access to documents under Articles 716 (your statements), 718 (documents and other tangible objects), 721 (statements of co-conspirators), 722 (confessions and inculpatory statements of co-defendants), you cannot gain access to or inspect any reports, memos, or internal state documents which are made by the district attorney or by agents of the state in connection with your case. You also cannot gain access to statements made by witnesses or future witnesses (other than yourself) to the district attorney or other agents of the state.

<sup>119</sup> LA. CODE CRIM. PROC. ANN. art. 723(B) (2017).

<sup>120</sup> LA. CODE CRIM. PROC. ANN. art. 719(B) (2017).

<sup>121</sup> LA. CODE CRIM. PROC. ANN. art. 720 (2017); *See* State v. Hamilton, 478 So. 2d 123, 132 (La. 1985) (holding that failure to provide defendant notice that prosecutor intended to introduce evidence of uncharged unrelated armed robbery at penalty phase was prejudicial error in first-degree murder trial, particularly where evidence of armed robbery was only indication to jury of any previous violent criminal behavior by defendant and was only basis for prosecutor's argument to jury that defendant, who had no prior felony convictions, should be sentenced to death).

<sup>122</sup> LA. CODE CRIM. PROC. ANN. art. 720 (2017).

<sup>123</sup> LA. CODE CRIM. PROC. ANN. art. 721 (2017).

<sup>124</sup> Note that co-defendants must be charged with a case in order to qualify for this rule, see State v. Tupa, 515 So. 2d 516, 520 (La. App. 1 Cir. 1987) (holding that defendant was not entitled, in prosecution for arson with intent to defraud, to discover statements made by co-participant; co-participant was never officially charged and thus was not “codefendant,” within meaning of this rule).

<sup>125</sup> *See* LA. CODE CRIM. PROC. ANN. art. 723(B) (2017) (the state shall provide the defendant with any evidence constitutionally required to be disclosed pursuant to *Brady v. Maryland*, 373 U.S. 83, 87 (1963), which held that withholding exculpatory evidence violates due process if the evidence is material to guilt or punishment).

b. Discovery by the State

There are also rules for how the state can get discovery. It is important to know these rules to see how the other side builds their case and to watch for any improper conduct.

i. *Documents and Tangible Objects*

Article 724 states that when the court grants your order made under Article 718 (access to documents and other tangible objects), the district attorney can also move to condition the order. This requires you to provide the prosecution with access to, let the prosecution inspect, and reproduce any documents or tangible things that you, the defendant, might have and that you intend to use at trial.<sup>126</sup>

ii. *Reports of Examinations and Tests*

Article 725 imposes a two-way obligation; when the court grants your order under Article 719 (access to exams and tests), the district attorney can also make a motion to condition the order so that the district attorney can inspect or reproduce the results or reports of any physical or mental exams, along with any scientific tests or experiments made in connection with your case that you either have or know about and want to use at trial.<sup>127</sup> The district attorney can also gain access to this evidence if it was prepared by a witness who you want to call at trial for the defense, if those reports and results relate to his or her testimony.<sup>128</sup>

iii. *Notice of Defense Based upon Mental Condition*

If you want to use testimony about a mental disease, defect, or another condition that bears on whether you had the mental state required for the crime you are charged with, you must write the district attorney to let him or her know this. You must tell this to the district attorney in writing at least ten days before trial begins (or some reasonable time period the court may determine). The court can also allow late filing of this notice or give both sides more time to prepare for this issue at trial.<sup>129</sup>

If you don't give the other side notice (tell the district attorney), the court can choose to exclude (not allow) the testimony of any witness that you want to testify about the issue of mental condition.<sup>130</sup>

iv. *Notice of Alibi*

After you get a written demand by the district attorney, which states the time, date, and place where the alleged crime was committed, you have a responsibility to tell the district attorney through written notice that you want to mount a defense of alibi. You have to give written notice to the district attorney within ten days (or at some time that the court may choose).<sup>131</sup> You must include the specific place or places where you claim to be at the time of the crime and the names and addresses of the witnesses you want to use to prove your alibi.<sup>132</sup>

Ten days after you file that written notice (but this must be at least ten days before trial), the district attorney must then respond by filing their own written notice which states the names and addresses of the witnesses they want to use to prove you were at the scene of the crime and any other witnesses they might use to challenge your alibi.<sup>133</sup>

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<sup>126</sup> LA. CODE CRIM. PROC. ANN. art. 724 (2017).

<sup>127</sup> LA. CODE CRIM. PROC. ANN. art. 725 (2017).

<sup>128</sup> LA. CODE CRIM. PROC. ANN. art. 725 (2017).

<sup>129</sup> LA. CODE CRIM. PROC. ANN. art. 726(A) (2017).

<sup>130</sup> LA. CODE CRIM. PROC. ANN. art. 726(B) (2017).

<sup>131</sup> LA. CODE CRIM. PROC. ANN. art. 727(A) (2017).

<sup>132</sup> LA. CODE CRIM. PROC. ANN. art. 727(A) (2017).

<sup>133</sup> LA. CODE CRIM. PROC. ANN. art. 727(B) (2017).

If you or the district attorney learns of some additional (more) witness before or during trial, that should have been included in the written notices, you and the district attorney must tell the other side about the extra witnesses and who they are.<sup>134</sup>

If you or the district attorney don't follow these rules, the court can exclude (not allow) the testimony of any witnesses not listed on the written notice even if the witness will help prove or challenge your alibi.<sup>135</sup> This rule does not limit your own right to testify about where you were at the time of the crime.<sup>136</sup>

The court can also grant an exception to any of these requirements if either side makes a showing of good cause (you show that you have a good reason) that the requirements should be modified (changed).<sup>137</sup> Finally, evidence of your intention to rely on an alibi defense (like your written notice or other statements) if later withdrawn (taken back), cannot be used as admissible evidence against you in any civil or criminal proceeding.<sup>138</sup>

#### v. *Defense Information and Other Matters Not Subject to Disclosure*

Except for scientific and medical reports,<sup>139</sup> along with documents you want to use at trial, the government cannot get access to any reports, memos, or internal defense documents that you or your attorneys prepared in connection with your case.<sup>140</sup> The state also cannot discover any statements you make<sup>141</sup> or any statement your witnesses make to you or your attorney. The state cannot discover the names of your defense witnesses or possible defense witnesses.<sup>142</sup>

#### c. Regulation of Discovery

Article 729 covers how to do discovery in every criminal case that will be tried in state district court, after a grand jury indictment, or notice by the district attorney.<sup>143</sup> All your motions for discovery must follow the rules in Article 521 (which cover the timing of pre-trial motions, stating that they must be made within fifteen days after arraignment, or some other time as the court chooses)<sup>144</sup> or within some reasonable time that the court allows.<sup>145</sup> That motion must include all the different discovery measures you want to use (access to the district attorney's records of your statements, certain documents and tangible things, statements by co-conspirators, etc.). If you need to make another motion to get more discovery, have to make the motion before trial and show that this new motion would be in the interests of justice.<sup>146</sup>

If the court wants to deny your motion for discovery, you can get a hearing to argue for your motion, unless it is clear on the face of the motion that you are not entitled to the discovery (and so the court can deny it without holding the hearing).<sup>147</sup> The court also has the right, upon a sufficient showing by either you

<sup>134</sup> LA. CODE CRIM. PROC. ANN. art. 727(C) (2017).

<sup>135</sup> LA. CODE CRIM. PROC. ANN. art. 727(D) (2017); *See* State v. Williams, 392 So. 2d 619, 621 (La. 1980) (holding that in first-degree murder prosecution, trial court properly refused to allow defendant to call three defense witnesses because defense had failed to comply with this article).

<sup>136</sup> LA. CODE CRIM. PROC. ANN. art. 727(D) (2017).

<sup>137</sup> LA. CODE CRIM. PROC. ANN. art. 727(E) (2017).

<sup>138</sup> LA. CODE CRIM. PROC. ANN. art. 727(F) (2017).

<sup>139</sup> *See* LA. CODE CRIM. PROC. ANN. art. 725 (2017). Some medical reports can be protected from discovery as well. *See* State v. Frank, 2001-2055, p. 1 (La. 8/30/02); 825 So. 2d 1097, 1097 (state was not entitled to discovery of psychiatrist's notes on her discussion with defendant in a single interview; given the preliminary nature of the evaluation, the notes were not a "report" for purposes of discovery article applicable to medical reports).

<sup>140</sup> LA. CODE CRIM. PROC. ANN. art. 728 (2017).

<sup>141</sup> *See* Thibodeaux v. Thibodeaux, 538 So.2d 683, 684 (La. App. 3 Cir. 1989) (trial court acted improperly when ordering defendant to answer all questions asked at oral deposition and in written interrogatories, insofar as certain questions could have resulted in defendant incriminating himself in criminal activity).

<sup>142</sup> *See* LA. CODE CRIM. PROC. ANN. art. 728 (2017).

<sup>143</sup> LA. CODE CRIM. PROC. ANN. art. 729.6 (2017).

<sup>144</sup> LA. CODE CRIM. PROC. ANN. art. 521 (2017).

<sup>145</sup> LA. CODE CRIM. PROC. ANN. art. 729 (2017).

<sup>146</sup> LA. CODE CRIM. PROC. ANN. art. 729 (2017).

<sup>147</sup> LA. CODE CRIM. PROC. ANN. art. 729.1(A) (2017).

or the government, to vacate, restrict, or defer any past order for discovery or modify it in an appropriate way (change or limit any past order of discovery).<sup>148</sup>

If the court grants a discovery motion by you or the district attorney, the order must list the time, place, and manner of making the discovery and inspection, along with any other appropriate terms.<sup>149</sup>

Each side also has a continuing duty to disclose during discovery. That means that if you or the district attorney later discover any additional evidence (or decide to use additional evidence at trial that you or the district attorney didn't plan on using before), you and the state must quickly tell the other side and the court of the existence of this additional evidence. The court can then change the past discovery order or allow the other side to make a motion for more discovery or inspection.<sup>150</sup>

A court can sometimes make the district attorney and you or your attorney meet in a pretrial conference to sort out discovery motions without a formal hearing, if there aren't any objections or previous voluntary compliance, and to also consider other matters that may help in the prompt and fair resolution of the case.<sup>151</sup>

If any party doesn't follow the rules of the criminal discovery process, the court can, at any time, order that party to allow the discovery, pause the case, order a mistrial (if you make such a motion), prohibit the evidence they did not tell you about from being used at trial, or some other appropriate order.<sup>152</sup> In addition, if the court finds out either before or after trial that you, your attorney, or the government (usually the district attorney or assistant district attorney) chose not to follow the discovery rules, it can hold the responsible party in contempt of court.

## C. FREEDOM OF INFORMATION

### 1. Right of Access to Information

Under some federal and state laws, you have the right to access many records held by local, state, and federal governments. If you want documents from the federal government or any of its agencies, you will need to file a request under the Federal Freedom of Information Act. Please refer to Chapter 7(B) of the main *JLM* for more information about obtaining such documents.

This Part will discuss your right of access to state and local government records. Both the Louisiana Constitution and the Louisiana Public Records Law guarantee your access to public records held by state and local government agencies.<sup>153</sup> In most cases, access to public records is broadly granted. It may be denied only when the law specifically denies access.<sup>154</sup>

As a preliminary matter, the law limits certain individuals' requests for public documents. If you are in prison for a felony conviction and have exhausted all possibilities for appeal, you may obtain only those public records needed to support a petition for post-conviction relief under Louisiana Code of Criminal Procedure Article 930.3.<sup>155</sup> In addition, certain restrictions apply to individuals under the age of eighteen.<sup>156</sup> Other restrictions on access to certain documents are discussed below.

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<sup>148</sup> LA. CODE CRIM. PROC. ANN. art. 729.1(B) (2017).

<sup>149</sup> LA. CODE CRIM. PROC. ANN. art. 729.2 (2017).

<sup>150</sup> LA. CODE CRIM. PROC. ANN. art. 729.3 (2017).

<sup>151</sup> LA. CODE CRIM. PROC. ANN. art. 729.4 (2017).

<sup>152</sup> LA. CODE CRIM. PROC. ANN. art. 729.5 (2017).

<sup>153</sup> See LA CONST. art. XII, § 3; LA. REV. STAT. ANN. § 44:31 (2017).

<sup>154</sup> LA. REV. STAT. ANN. § 44:31 (2017).

<sup>155</sup> See Chapter 2(H)(1)(a) of the *Louisiana State Supplement* for information regarding the grounds for post-conviction relief under LA. CODE CRIM. PROC. ANN. art. 930.3 (2017).

<sup>156</sup> LA. REV. STAT. ANN. § 44:32(A) (2017) (public records will be presented to any person over the age of majority).

## 2. Public Records in General

A public record is a document used by the state government or any of its agencies.<sup>157</sup> Louisiana law has several exceptions to this definition. Records about pending or anticipated criminal litigation (criminal charges) are not public records, until such litigation has been finally adjudicated or otherwise settled.<sup>158</sup> However, proceedings for post-conviction relief are not considered pending criminal litigation and don't fall under this exception.<sup>159</sup> Whether a record "pertains" to (is about) criminal litigation is determined on a case-by-case basis.<sup>160</sup>

Records containing the identity of confidential sources of information or undercover police officers are not public records. Records containing information about criminal intelligence of terrorist-related activity are not public records.<sup>161</sup>

Arrest records are not public records until after a final judgment of conviction or the acceptance of a guilty plea. However, the initial report of the arrest, booking records, and records of the issuance of the citation are public records.<sup>162</sup>

Records collected and maintained by the Louisiana Bureau of Criminal Identification and Information are not public records, but each person may view his or her own criminal records and history.<sup>163</sup> Records held by the bureau's central registry of sex offenders, however, are public.<sup>164</sup> See Section C(3) below for more information about accessing your own criminal records.

### a. Procedure

This Section describes the procedures for getting access to public records in general, criminal records, and medical records. It also contains information about obtaining your rap sheet, requesting corrections to your rap sheet, and expunging previous records.

#### i. *General Procedure to Obtain Access to Records*

In general, to get a public document, you should write a request to the department in control of the records you seek. Refer to Section C(3) for an example of such a request, and to Appendix A(B) for the mailing addresses of different departments in charge of holding public records. The custodian of the records (person that has and keeps the records) must give you copies, but you will have to pay any fees for making copies.

The custodian has three days (not counting Saturdays, Sundays, and legal public holidays) to tell you of his decision about whether the record you want is a public record.<sup>165</sup> If you disagree with the custodian's decision or you have not received a response within five days (not counting Saturdays, Sundays, and legal public holidays) of your request, you may start proceedings for the issuance of a "writ of mandamus," which is a court order requiring the custodian to turn over the documents.<sup>166</sup> To start these proceedings, you must file a complaint in the district court for the parish where the custodian's office is

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<sup>157</sup> See LA. REV. STAT. ANN. § 44:1(A)(2)(a) (2017).

<sup>158</sup> LA. REV. STAT. ANN. § 44:3(A)(1) (2017).

<sup>159</sup> *Lemmon v. Connick*, 590 So. 2d 574, 575 (La. 1991) (holding that post-conviction relief is not "pending criminal litigation" within the meaning of the Public Records Act).

<sup>160</sup> See *Cormier v. In re: Public Records Request of Guilio*, 553 So. 2d 806, 807 (La. 1989) (holding that the determination of whether a specific record is a record of "pending criminal litigation" must be made on a case-by-case basis).

<sup>161</sup> LA. REV. STAT. ANN. § 44:3(A)(3) (2017).

<sup>162</sup> LA. REV. STAT. ANN. § 44:3(A)(4)(a) (2017).

<sup>163</sup> LA. ADMIN. CODE tit. 22, pt. III, § 703 (2017); LA. REV. STAT. ANN. § 44:3(A)(7) (2017).

<sup>164</sup> LA. REV. STAT. ANN. § 44:3(A)(7) (2017).

<sup>165</sup> LA. REV. STAT. ANN. § 44:32(D) (2017).

<sup>166</sup> LA. REV. STAT. ANN. § 44:35(A) (2017).

located.<sup>167</sup> You will be granted a hearing at which the custodian must prove that he was correct to deny access.<sup>168</sup> If the custodian cannot present a lawful reason for denying access, then he will be required to turn it over, assuming no other restriction applies.<sup>169</sup>

### 3. Criminal Records

As a prisoner, you may access your master prison record, a sentence computation worksheet, any court documents that are related to your current prison term, non-confidential unusual occurrence reports, disciplinary reports, and information related to your educational achievement and participation.<sup>170</sup> You may view your state police or FBI rap sheet, but you may not copy it.<sup>171</sup>

You may not access the following documents unless you show a special need:

- 1) Presentence reports;
- 2) Post-sentence reports;
- 3) Pre-parole reports;
- 4) Clemency investigations;
- 5) Information revealing the identity of confidential informants;
- 6) Admission summary;
- 7) Correspondence from any non-departmental source directed solely to institutional officials;
- 8) Correspondence or inquiries originated by institutional personnel;
- 9) Investigations conducted by non-departmental agencies, for example, District Attorney, State Police, FBI, etc.
- 10) Investigations conducted by Corrections Service;
- 11) Non-disciplinary court-related institutional investigations; and
- 12) Correspondence from victims or witnesses, including Victim Notice and Registration Forms.<sup>172</sup>

The public, including you, may not access records held by the office of the attorney general, police department, or the Department of Public Safety and Corrections that pertain to pending criminal litigation.<sup>173</sup> However, records about your own pending criminal litigation may be accessed through various forms of discovery (*see* Part B of this Chapter for information on discovery methods).

A criminal litigation is pending until either a final conviction has been issued and all possibilities of appeal (not including actions for post-conviction relief) have been exhausted (used or tried) or a guilty plea has been accepted.<sup>174</sup> Whether a document is about a criminal litigation is decided on a case-by-case basis and is subject to appeal.<sup>175</sup>

This means that if you disagree with a decision about whether the information you want is about pending criminal litigation, you may request a hearing at which you may present evidence challenging that decision.<sup>176</sup>

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<sup>167</sup> LA. REV. STAT. ANN. § 44:35(A) (2017). *See* Appendix A(B) below for the mailing addresses of Clerks of Court for each parish.

<sup>168</sup> LA. REV. STAT. ANN. § 44:35(B) (2017).

<sup>169</sup> *See, e.g., Freeman v. Guaranty Broadcasting Corp.*, 498 So. 2d 218, 223, 225 (La. App. 1 Cir. 1986) (finding that a general assertion that documents reveal investigative techniques is insufficient to justify withholding documents).

<sup>170</sup> LA. ADMIN. CODE tit. 22, pt. I, § 101(J)(1)(a) (2017).

<sup>171</sup> LA. ADMIN. CODE tit. 22, pt. I, § 101(J)(1)(b) (2017).

<sup>172</sup> LA. ADMIN. CODE tit. 22, pt. I, § 101(J)(1)(d) (2017).

<sup>173</sup> LA. REV. STAT. ANN. § 44:3(A)(1) (2017).

<sup>174</sup> *See Harrison v. Norris*, 569 So. 2d 585, 587 (La. App. 2 Cir. 1990) (holding that a post-conviction relief action is not criminal litigation as contemplated by LA. REV. STAT. ANN. § 44:3 so as to render the records inaccessible or privileged against inspection by the Public Records Act).

<sup>175</sup> *See Cormier v. In re: Public Records Request of Guilio*, 553 So. 2d 806, 807 (La. 1989) (holding that the determination of whether a specific record is a record of “pending criminal litigation” must be made on a case-by-case basis and is subject to judicial review).

<sup>176</sup> *See Cormier v. In re: Public Records Request of Guilio*, 553 So. 2d 806, 807 (La. 1989) (“The public records statute requires more than a judicial acceptance of an assertion of privilege by the prosecutor; there must be an opportunity



Although arrest records are not made public until after the criminal litigation is final, the initial report of the arrest, booking records, and records of the issuance of the citation are accessible by the public, even if they are about pending criminal litigation.<sup>177</sup>

To get records from Corrections Services, you must write the unit head. You must certify (say) in writing that you will not release the information to any other individual or agency.<sup>178</sup> For information about response time and appealing the agency's decision, please refer to Section C(2) of this Chapter describing the procedure for obtaining public records in general.

a. Rap Sheets

Rap sheets are not public records, but each individual has the right to view his own rap sheet.<sup>179</sup> To get access to your criminal record, or rap sheet, you must send a written and signed request for the document to the criminal justice agency holding the record. Your request must be specific enough that the person that has your record will be able to locate it. You may be required to include fingerprints and other personal identifiers to help locate and get the records you requested.<sup>180</sup> Replies to requests for documents that need fingerprints may take up to 30 days.<sup>181</sup>

You have the right to challenge the content, completeness, or accuracy of your rap sheet.<sup>182</sup> To challenge your rap sheet, submit a complaint in the form of a written letter to the criminal justice agency that has your record and a copy of the complaint to the Privacy and Security Committee at the Louisiana Commission on Law Enforcement (LCLE) (*see* Appendix A(B) for addresses). Your complaint should be specific about what you believe should be changed. You must state and sign the complaint, say that the complaint is made in good faith, and that the changes you want to make are true to the best of your knowledge. You must include fingerprints along with your complaint.<sup>183</sup>

An officer will review your file within 45 days and submit his findings (decision) to you within 15 days after he concludes his review. If you disagree with the results, you can petition (ask) the LCLE Privacy and Security Committee to review the decision. This petition must be made within 30 days of the criminal justice agency's decision.<sup>184</sup> It should include a statement about what you think should be changed, the date and result of the criminal justice agency's review, and a signed statement saying that the facts in the petition are true.<sup>185</sup>

After an officer gets your petition, the officer will schedule a hearing for you to present evidence supporting your complaint. The criminal justice agency will also present evidence at this hearing. After the hearing, a final judgment will be issued and further appeals should be made under § 49:950 of the Louisiana Administrative Procedure Act.

b. Expungement

Certain criminal records can be expunged under the Louisiana Code of Criminal Procedure.<sup>186</sup> When a record is "expunged," it is removed from public view and kept under lock and key, and can only be viewed

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for cross examination and presentation of evidence to contradict the claim of privilege."); *See* LA. REV. STAT. ANN. § 44:3(C) (2017).

<sup>177</sup> LA. REV. STAT. ANN. § 44:3(A)(4)(a) (2017).

<sup>178</sup> LA. ADMIN. CODE tit. 22, pt. I, § 101(K)(1) (2017).

<sup>179</sup> LA. ADMIN. CODE tit. 22, pt. III, § 703 (2017); *LA. REV. STAT. § 15:588* (2017); *Ellerbe v. Andrew*, 623 So. 2d 41, 44 (La. App. 1 Cir. 1993) (holding that rap sheets are not accessible by third parties).

<sup>180</sup> LA. ADMIN. CODE tit. 22, pt. III, § 705 (2017).

<sup>181</sup> LA. ADMIN. CODE tit. 22, pt. III, § 725(A) (2017).

<sup>182</sup> LA. ADMIN. CODE tit. 22, pt. III, § 905 (2017).

<sup>183</sup> LA. ADMIN. CODE tit. 22, pt. III, § 907 (2017).

<sup>184</sup> LA. ADMIN. CODE tit. 22, pt. III, § 913 (2017).

<sup>185</sup> LA. ADMIN. CODE tit. 22, pt. III, § 915 (2017).

<sup>186</sup> LA. CODE CRIM. PROC. ANN. arts. 971–996 (2017).

at the request of a law enforcement agency, criminal justice agency, and various state professional boards. Expungement does not mean that the record is destroyed. Expungement is not available to convicted felons who are currently in prison.<sup>187</sup> More limits on expungement are discussed below.

To request expungement of a record, send your request in writing to the district court located in the parish in which the violation was prosecuted or in which the arrest was made if you didn't end up getting prosecuted. In filing the request, you may also be required to pay the following fees:

- 1) \$250 to The Bureau of Criminal Identification and Information,
- 2) \$50 to the sheriff's office,
- 3) \$50 to the District Attorney's office, or
- 4) Up to \$200 to the court clerk for processing.<sup>188</sup>

If you were arrested but never prosecuted and did not enter a pretrial "diversion program" then you do not need to pay any fees.<sup>189</sup>

#### i. *Misdemeanor Violations of Parish or Municipal Ordinances*

Although expungement is widely available for records of misdemeanor arrests and convictions, there are three exceptions. First, records of misdemeanor convictions for sexual acts or acts of domestic violence cannot be expunged.<sup>190</sup> Second, a record of a conviction may be expunged only after five years have passed since the date of the motion for expungement and the completion of your sentence, probation, or parole.<sup>191</sup> Third, expungement is available only once every five years—except in the case of a misdemeanor offense of operating a vehicle while intoxicated, which may be expunged only once every ten years.<sup>192</sup>

In addition to the limits above, you may request expungement for the record of an arrest or a conviction for a misdemeanor violation only if:

- 1) The time limitation for the institution of prosecution on the offense has expired, and no prosecution has been instituted (you were never charged); or
- 2) The prosecution has been instituted and has been dismissed (you were charged and the charges were dismissed) or you have been acquitted.<sup>193</sup>

Although the statute says otherwise, records of arrests relating to a first or second violation of driving while intoxicated *are* eligible for expungement. This is because a 1978 case, *State v. Bradley*, held that this portion of the expungement statute was unconstitutional because it denied equal protection of the law.<sup>194</sup>

#### ii. *Felonies*

You may request expungement of records of an arrest for a felony that did not result in a conviction if:

- 1) You were not prosecuted for the offense for which you were arrested and prosecution was barred for that offense;

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<sup>187</sup> LA. CODE CRIM. PROC. ANN. art. 975 (2017).

<sup>188</sup> LA. CODE CRIM. PROC. ANN. arts. 983(A), (B) (2017).

<sup>189</sup> LA. CODE CRIM. PROC. ANN. art. 983(F) (2017).

<sup>190</sup> LA. CODE CRIM. PROC. ANN. art. 977(C) (2017).

<sup>191</sup> LA. CODE CRIM. PROC. ANN. art. 977(A) (2017).

<sup>192</sup> LA. CODE CRIM. PROC. ANN. art. 977(D) (2017).

<sup>193</sup> LA. CODE CRIM. PROC. ANN. art. 976 (2017).

<sup>194</sup> *State v. Bradley*, 360 So. 2d 858, 862 (La. 1978) (holding that in the absence of any rational basis for treating persons arrested but not convicted for driving while intoxicated differently from persons arrested but not convicted of other misdemeanors, the statute which denied the benefits of expungement to those arrested for driving while intoxicated was a denial of equal protection and was unconstitutional).

- 2) The district attorney declined to prosecute you for that offense;
- 3) You were prosecuted but the charges were dismissed, you were acquitted, or a motion to quash was granted; or
- 4) You were found to be factually innocent and entitled to compensation for wrongful conviction.<sup>195</sup>

However, if you were arrested but not convicted for a state or municipal ordinance that prohibits operating a vehicle while intoxicated or under the influence of drugs and were sent to a pretrial diversion program, you will not be able to request expungement of those records until five years after the date of your arrest for that offense.<sup>196</sup>

If your arrest did result in a felony conviction, for most felonies you may request expungement if:

- 1) The conviction was set aside and the prosecution was dismissed with a suspended sentence and probation; or
- 2) More than ten years have passed since you completed the sentence, deferred adjudication, or any probation or parole time based on the conviction, you have not been convicted of any other criminal offense during that ten-year period, and you have no criminal charges pending against you.
- 3) The motion includes a certification from the district attorney that says you had no convictions and no pending charges during that ten-year period.<sup>197</sup>

However, if the felony for which you were convicted was a crime of violence,<sup>198</sup> a sex offense or criminal offense against a victim who is a minor,<sup>199</sup> most violations of the Uniform Controlled Dangerous Substances Law,<sup>200</sup> or domestic battery, you may not expunge that record.<sup>201</sup>

Although most crimes of violence are not expungable, if the offense for which you were convicted was aggravated battery, second-degree battery, aggravated criminal damage to property, simple robbery, purse snatching, or illegal use of weapons or dangerous instrumentalities, you may request expungement if:

- 1) More than ten years have passed since you completed the sentence, deferred adjudication, or completed the probation or parole period;
- 2) You have not been convicted of any other criminal offense during the ten-year period;
- 3) You have no criminal charges pending against you;
- 4) You have been employed for ten consecutive years; and
- 5) The motion includes a certification from the district attorney that says you had no convictions and no pending charges during that ten-year period.<sup>202</sup>

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<sup>195</sup> LA. CODE CRIM. PROC. ANN. art. 976(A) (2017).

<sup>196</sup> LA. CODE CRIM. PROC. ANN. art. 976(B) (2017).

<sup>197</sup> LA. CODE CRIM. PROC. ANN. art. 978(A) (2017).

<sup>198</sup> LA. CODE CRIM. PROC. ANN. art. 978(B)(1) (2017) refers to crimes defined in LA. STAT. ANN. § 14:2(B) (2017) as a “crime of violence.” This means “an offense that has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, and that, by its very nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense or an offense that involves the possession or use of a dangerous weapon.”

<sup>199</sup> LA. CODE CRIM. PROC. ANN. art. 978(B)(2) (2017). The provision defines these offenses by referring to LA. STAT. ANN. § 15:541 (2017). It also includes “any offense which occurred prior to June 18, 1992, that would be defined as a sex offense or a criminal offense against a victim who is a minor had it occurred on or after June 18, 1992.” If the conviction was for carnal knowledge of a juvenile and occurred prior to August 15, 2001, it is eligible for expungement if the offense would have been defined as a misdemeanor had the conviction occurred on or after August 15, 2001.

<sup>200</sup> LA. CODE CRIM. PROC. ANN. art. 978(B)(3) (2017). Violations of the Uniform Controlled Dangerous Substances Law that *may* be expunged include convictions for: possession, possession with intent to distribute, any violation not punishable by more than five years’ imprisonment, or a conviction that can be expunged pursuant to art. 893(E) (referring to offenses where the sentence was suspended pursuant to probation).

<sup>201</sup> LA. CODE CRIM. PROC. ANN. art. 978(B) (2017).

<sup>202</sup> LA. CODE CRIM. PROC. ANN. art. 978(E) (2017).

You may only expunge your record of a felony conviction once during a fifteen-year period.<sup>203</sup>

iii. *Fees*

You should be prepared to pay the regular service fees for copies of documents requested under the Public Records Law.<sup>204</sup> If you can't pay the fees, a court can decide to give you without charge or at a reduced fee.<sup>205</sup>

c. Medical Records

Access to medical records is normally withheld from (not allowed for) inmates. Your warden may grant access upon a showing of special need.

## D. CONCLUSION

Getting information about your case is the first step in seeking several types of relief. Information will help you appeal your conviction, file a complaint, or request a correction of your rap sheet. The rules on how to access to information are mainly procedural rules that you must follow closely. Read the rules and any relevant case law carefully. Make sure you are following the correct procedure, that you know what your rights are, and that you know what kind of information the government must give you. As you start to search for documents, be sure to read the rules and instructions above and follow the rules. Even small mistakes can end up delaying your request. The discovery process is about getting information on the issues in your case. This process is key to building your case and winning your lawsuit.

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<sup>203</sup> LA. CODE CRIM. PROC. ANN. art. 978(D) (2017).

<sup>204</sup> State *ex rel.* McKnight v. State, 98-2258, p. 1 (La. App. 1 Cir. 12/3/98); 742 So. 2d 894, 895. (noting that inmate proceeding under the Louisiana Public Records Law “should be prepared to pay the regular service fees for copies of the documents”).

<sup>205</sup> Diggs v. Pennington, 2003-0057, p. 4 (La. App. 4 Cir. 6/4/03); 849 So. 2d 756, 758 (holding that a need for a police report by indigent prisoner gave him an *opportunity* to obtain a free copy, but it did not give him the *right* to one.)

## APPENDIX A

### SAMPLE FORMS AND LETTERS

#### A. SAMPLE PUBLIC RECORDS REQUEST LETTER

[Return Address]  
[Date]

[Records Access Officer]  
[Name of Agency]  
[Address of Agency]  
[City, LA ZIP code]

Re: Public Records Law Request

Records Access Officer:

Under the provisions of the Louisiana Public Records Law, LSA Rev. Stat. § 44:9, I hereby request records or portions thereof pertaining to \_\_\_\_\_ [identify the records in which you are interested as clearly as possible].

If there are any fees for copying the records requested, please inform me before filling the request [or: . . . please supply the records without informing me if the fees are not in excess of \$\_\_].

As you know, the Louisiana Public Records Law requires that an agency respond to a request within three business days of receipt of a request. Therefore, I would appreciate a response as soon as possible and look forward to hearing from you shortly. If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name and address of the person or body to whom an appeal should be directed.

Sincerely,

[Signature]

## B. MAILING ADDRESSES AND TELEPHONE NUMBERS

1. *Bureau of Criminal Identification and Information*

P.O. Box 66614  
A-6  
Baton Rouge, LA 70806  
Telephone: (225) 925-6095

2. *Louisiana Commission on Law Enforcement and Administration of Criminal Justice*

P.O. Box 3133  
Baton Rouge, LA 70821  
Telephone: (225) 342-1500

### 3. *Parish Courthouses*

**FOR ADDITIONAL CONTACT INFORMATION FOR PARISH COURTHOUSES, *SEE* CHAPTER 10, APPENDIX A. “THE STATE’S DUTY TO PROTECT YOU AND YOUR PROPERTY—TORT ACTIONS”**

Acadia Parish  
P.O. Box 922  
Crowley, LA 70527-0922  
Telephone: (318) 788-8881

Allen Parish Clerk of Court  
P.O. Box 248  
Oberlin, LA 70655-0248  
Telephone: (318) 639-4351

Ascension Parish Clerk of Court  
P.O. Box 192  
Donaldsonville, LA 70346-0192  
Telephone: (504) 473-9866

Assumption Parish Clerk of Court  
P.O. Drawer 249  
Napoleonville, LA 70390  
Telephone: (504) 369-6653

Avoyelles Parish Clerk of Court  
P.O. Box 196  
Marksville, LA 71351  
Telephone: (318) 253-7523

Beauregard Parish Clerk of Court  
P.O. Box 100  
De Ridder, LA 70634  
Telephone: (318) 463-8595

Bienville Parish Clerk of Court  
601 Locust St., Room 100  
Arcadia, LA 71001  
Telephone: (318) 263-2123

Bossier Parish Clerk of Court  
P.O. Box 430  
Benton, LA 71006-0430  
Telephone: (318) 965-2336  
Caddo Parish Clerk of Court  
501 Texas St., Room 103  
Shreveport, LA 71101  
Telephone: (318) 226-6780

Calcasieu Parish Clerk of Court  
P.O. Box 1030  
Lake Charles, LA 70602  
Telephone: (318) 437-3550

Caldwell Parish Clerk of Court  
P.O. Box 1327  
Columbia, LA 71418  
Telephone: (318) 649-2272

Cameron Parish Clerk of Court  
P.O. Box 549  
Cameron, LA 70631  
Telephone: (318) 775-5316

Catahoula Parish Clerk of Court  
P.O. Box 198  
Harrisonburg, LA 71340-0198  
Telephone: (318) 744-5497

Claiborne Parish Clerk of Court  
P.O. Box 330  
Homer, LA 71040  
Telephone: (318) 927-9601

Concordia Parish Clerk of Court  
P.O. Box 790  
Vidalia, LA 71373-0790  
Telephone: (318) 336-4204

De Soto Parish Clerk of Court  
P.O. Box 1206  
Mansfield, LA 71052  
Telephone: (318) 872-3110

East Baton Rouge Parish Clerk of Court  
222 Saint Louis St.  
Baton Rouge, LA 70821  
Telephone: (504) 389-3000

East Carroll Parish Clerk of Court  
400 1st St.  
Lake Providence, LA 71254-2616  
Telephone: (318) 559-2399

East Feliciana Parish Clerk of Court  
P.O. Drawer 599  
Clinton, LA 70722-0599  
Telephone: (504) 683-5145

Evangeline Parish Clerk  
P.O. Drawer 347  
Ville Platte, LA 70586-0347  
Telephone: (318) 363-5671

Franklin Parish Clerk of Court  
P.O. Box 1564  
Winnsboro, LA 71295-2750  
Telephone: (318) 435-5133

Grant Parish  
P.O. Box 263  
Colfax, LA 71417  
Telephone: (318) 627-3246

Iberia Parish Clerk of Court  
300 Iberia St., 1st Floor  
New Iberia, LA 70562-2010  
Telephone: (318) 365-8246

Iberville Parish Clerk of Court  
P.O. Box 423  
Plaquemine, LA 70765  
Telephone: (504) 687-5160

Jackson Parish Clerk of Court  
P.O. Box 730  
Jonesboro, LA 71251  
Telephone: (318) 259-2424

Jefferson Davis Parish Clerk of Court  
P.O. Box 799  
Jennings, LA 70546  
Telephone: (318) 824-1160

Jefferson Parish Clerk of Court  
P.O. Box 10  
Gretna, LA 70054  
Telephone: (504) 364-2900

Lafayette Parish Clerk of Court  
P.O. Box 2009  
Lafayette, LA 70502  
Telephone: (318) 233-0150



Lafourche Parish Clerk of Court  
P.O. Drawer 5548  
Thibodaux, LA 70302  
Telephone: (504) 446-8427

LaSalle Parish Clerk of Court  
P.O. Box 1316  
Jena, LA 71342  
Telephone: (318) 992-2158

Lincoln Parish Clerk of Court  
P.O. Box 924  
Ruston, LA 71273-0924  
Telephone: (318) 251-5130

Livingston Parish Clerk of Court  
P.O. Box 1150  
Livingston, LA 70754  
Telephone: (504) 686-2216

Madison Parish Clerk of Court  
P.O. Box 1710  
Tallulah, LA 71282-3840  
Telephone: (318) 574-0655

Morehouse Parish  
P.O. Box 1543  
Bastrop, LA 71220-1543  
Telephone: (318) 281-3343

Natchitoches Parish  
P.O. Box 476  
Natchitoches, LA 71458-0476  
Telephone: (318) 352-8152

Orleans Parish  
421 Loyola Ave., Rm. 402  
New Orleans, LA 70112-2114  
Telephone: (504) 592-9100

Ouachita Parish  
P.O. Box 1862  
Monroe, LA 71210-1862  
Telephone: (318) 327-1444

Plaquemines Parish  
P.O. Box 129  
Point à la Hache, LA 70082  
Telephone: (504) 333-4343

Point Coupee Parish  
P.O. Box 86  
New Roads, LA 70760  
Telephone: (504) 638-9596

Rapides Parish  
P.O. Box 952  
Alexandria, LA 71309-0952  
Telephone: (318) 473-8153

Red River Parish  
P.O. Box 485  
Coushatta, LA 71019-8537  
Telephone: (318) 932-6741

Richland Parish  
P.O. Box 119  
Rayville, LA 71269  
Telephone: (318) 728-4171

Sabine Parish  
P.O. Box 419  
Many, LA 71449-0419  
Telephone: (318) 256-6223

Saint Bernard Parish  
P.O. Box 1746  
Chalmette, LA 70044  
Telephone: (504) 271-3434

Saint Charles Parish  
P.O. Box 424  
Hahnville, LA 70057-0302  
Telephone: (504) 783-6632

Saint Helena Parish  
P.O. Box 308  
Greensburg, LA 70441  
Telephone: (504) 222-4514

Saint James Parish  
P.O. Box 63  
Convent, LA 70723-0063  
Telephone: (504) 562-7496

Saint John the Baptist Parish  
1801 W. Airline Hwy.  
La Place, LA 70068  
Telephone: (504) 652-9569

Saint Landry Parish  
118 S. Court Street, Ste. 207  
Opelousas, LA 70570  
Telephone: (318) 942-5606

Saint Martin Parish  
P.O. Box 308  
Saint Martinville, LA 70582  
Telephone: (318) 394-2210

Saint Mary Parish  
P.O. Drawer 1231  
Franklin, LA 70538-6198  
Telephone: (318) 828-4100, ext. 200

Saint Tammany Parish  
P.O. Box 1090  
Covington, LA 70434-1090  
Telephone: (504) 898-2430

Tangipahoa Parish  
P.O. Box 667  
Amite, LA 70422  
Telephone: (504) 748-4146

Tensas Parish  
Courthouse Square  
P.O. Box 78  
Saint Joseph, LA 71366  
Telephone: (318) 766-3921

Terrebonne Parish  
P.O. Box 1569  
Houma, LA 70361  
Telephone: (504) 868-5660

Union Parish  
Courthouse Building  
100 E. Bayou St., Suite 105  
Farmerville, LA 71241  
Telephone: (318) 368-3055

Vermilion Parish  
P.O. Box 790  
Abbeville, LA 70511-0790  
Telephone: (318) 898-1992

Vernon Parish  
P.O. Box 40  
Leesville, LA 71446  
Telephone: (318) 238-1384

Washington Parish  
P.O. Box 607  
Franklinton, LA 70438  
Telephone: (504) 839-4663

Webster Parish  
P.O. Box 370  
Minden, LA 71058  
Telephone: (318) 371-0366

West Baton Rouge Parish  
P.O. Box 107  
Port Allen, LA 70767  
Telephone: (504) 383-0378

West Carroll Parish  
P.O. Box 1078  
Oak Grove, LA 71263  
Telephone: (318) 428-3281

West Feliciana Parish  
P.O. Box 1843  
Saint Francisville, LA 70775  
Telephone: (504) 635-3794

Winn Parish  
101 Main St., Room 103  
Winnfield, LA 71483-0951  
Telephone: (318) 628-3515

## CHAPTER 2: APPEALING YOUR CONVICTION

### A. INTRODUCTION

This Chapter explains your legal rights regarding your conviction or sentence. It also explains how you can get your conviction undone or your sentence reduced if something was done incorrectly at your trial or hearing. Specifically, this Chapter focuses on the procedures for appealing your conviction or sentence in the state of Louisiana. Chapter 9 of the main *JLM* deals with New York law, so it will not be helpful for you to read that Chapter if you have been convicted in a Louisiana state court. However, you may want to read Chapter 9 of the main *JLM* for background information about appeals in general.<sup>1</sup> If you are currently in prison and you are already serving your sentence, you may have already passed the timeframe to file a notice of appeal. If those timelines have passed, Chapter 5 of the Louisiana State Supplement on state habeas corpus should be helpful to you.

Part B provides you with general background information about the courts that can hear your appeal and what you generally can appeal from. Part C discusses how you can go about making your motion to appeal. Part D discusses the various actions that take place after making your motion to appeal. Part E discusses how you preserve your right to appeal at trial. Part F discusses when you should bring an appeal, or in other words, reasons to bring an appeal. Part G discusses how your appeal is determined and when a judgment becomes final. Finally, Part H discusses your post-conviction relief rights.

### B. APPEALS IN GENERAL

In the state of Louisiana, you have the right to appeal. In an appeal, you exercise your right to have the judgment of the trial court revised, changed, set aside, or reversed by an appellate court.<sup>2</sup> If you have been convicted of and sentenced for a crime in a Louisiana state court, you can exercise this right to appeal by first submitting your appeal motion to the trial court in which you were originally sentenced.<sup>3</sup> If the motion is granted, your order of appeal will be entered, at which point, the Court of Appeal in the district where you were convicted will take over.<sup>4</sup> But in a Nineteenth Judicial District's city court's triable-by-jury criminal case, an appeal from a judgment will be taken to the Nineteenth Judicial District in the East Baton Rouge parish.<sup>5</sup> Ultimately, you may then appeal your case to the Supreme Court of Louisiana, the highest court in Louisiana.<sup>6</sup>

If you have been sentenced to the death penalty, Louisiana law allows you to appeal directly to the Supreme Court of Louisiana.<sup>7</sup> While you may appeal to the Supreme Court of Louisiana from a judgment in a capital case, in which a sentence of death has actually been imposed, the law does not require you to do so.<sup>8</sup> If you are eligible for the death penalty but instead receive a life sentence, your appeal will follow the normal path and will begin at the Court of Appeal.

Lastly, you may only appeal from a *final* judgment—which in most cases means a conviction and sentence.<sup>9</sup>

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<sup>1</sup> See the main *JLM*, Chapter 9 (direct appeals).

<sup>2</sup> LA. CODE CRIM. PROC. ANN. art. 911 (2017).

<sup>3</sup> LA. CODE CRIM. PROC. ANN. art. 914 (2017).

<sup>4</sup> LA. CODE CRIM. PROC. ANN. art. 916 (2017).

<sup>5</sup> LA. CODE CRIM. PROC. ANN. art. 912.1(B)(2) (2017).

<sup>6</sup> LA. CODE CRIM. PROC. ANN. art. 922(A) (2017).

<sup>7</sup> LA. CODE CRIM. PROC. ANN. art. 912.1(A)(1) (2017).

<sup>8</sup> See *State v. Bordelon*, 2007-0525 p. 9 (La. 10/16/09); 33 So. 3d 842, 849 (holding that a defendant who had been sentenced to death had the right to make an informed decision to waive his right to appeal, but that his waiving the right to appeal did not change the Supreme Court's duty to review the capital sentence under LA CODE CRIM. PROC. ANN. art. 905.9 (2017); LA CODE CRIM. PROC. ANN. art. 912.1(A)(2) (2017)).

<sup>9</sup> LA. CODE CRIM. PROC. ANN. art. 912(C)(1) (2017).

### C. MAKING YOUR MOTION TO APPEAL

If you have been convicted in a capital case and have been sentenced to the death penalty, you do not need to make a motion to appeal your sentence. The Supreme Court of Louisiana will automatically review every death sentence to determine if it is excessive.<sup>10</sup> In all other cases, you must make a motion for an appeal.<sup>11</sup> Your motion for an appeal can be made either in an open court oral testimony or through a written notice filed with the trial court clerk.<sup>12</sup> Either way, this motion will then be entered in the minutes (a summarized record of the proceedings) of the court.<sup>13</sup>

Two separate paths exist for 1) appealing your judgment or ruling or 2) appealing your sentence. If you are appealing your judgment or ruling, you must move for an appeal within thirty days of that judgment or ruling's passage.<sup>14</sup> If you are appealing your sentence, you must move for an appeal within thirty days after the ruling on a motion to reconsider your sentence.<sup>15</sup> Therefore, you do *not* have to make a motion to reconsider your sentence in order to appeal. That said, you can move to reconsider your sentence. Doing so would still allow you the option to move for an appeal within thirty days after the ruling on your motion to reconsider that sentence. If you file a motion to reconsider your sentence, please refer to Article 881.1 of the Louisiana Code of Criminal Procedure.<sup>16</sup>

With the exception of certain legal holidays, every day counts towards this thirty-day time limit.<sup>17</sup> This limit is important to obey when bringing your appeal. Your conviction and sentence will become final if you fail to move for an appeal within the thirty days. Again, you have thirty days to move for an appeal after the judgment or ruling from which you are making your appeal. But if you make a motion to reconsider your sentence, then you will have thirty days to move for an appeal after a ruling on your motion to reconsider is made.

If you have failed to move for an appeal within the thirty-day time period, you can only obtain appellate review by seeking a reinstatement of your right to appeal through an application for post-conviction relief.<sup>18</sup> This is not the best route. Post-conviction relief is discussed in Part H of this chapter.

When you make your motion for appeal, you must also request the part of your original trial proceeding's transcript that will be necessary for your appeal.<sup>19</sup> Only portions of the transcript that relate to the reasons you are bringing your appeal may be requested.<sup>20</sup> You or your attorney can request this transcript from the trial court that convicted you through a mailed notice of your appeal. The trial court or appellate court may also designate additional portions of the transcript if it decides that more is needed for a full and fair review.<sup>21</sup> Still, the ultimate burden is on you. As the appealing party, you have to make sure that the record is complete so that the appellate court can review the merits of your claim.<sup>22</sup>

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<sup>10</sup> LA. CODE CRIM. PROC. ANN. art. 905.9 (2017).

<sup>11</sup> LA. CODE CRIM. PROC. ANN. art. 914 (2017).

<sup>12</sup> LA. CODE CRIM. PROC. ANN. art. 914(A) (2017).

<sup>13</sup> LA. CODE CRIM. PROC. ANN. art. 914(A) (2017).

<sup>14</sup> LA. CODE CRIM. PROC. ANN. art. 914(B)(1) (2017).

<sup>15</sup> LA. CODE CRIM. PROC. ANN. art. 914(B)(2) (2017).

<sup>16</sup> LA. CODE CRIM. PROC. ANN. art. 881.1 (2017).

<sup>17</sup> LA. CODE CRIM. PROC. ANN. art. 13 (2017).

<sup>18</sup> *See* State v. Mims, 2006-1219, p. 2 (La. App. 3 Cir. 11/2/06) 942 So. 2d 70, 72 (La. App. 3 Cir. 2006) (holding that "A defendant's conviction and sentence becomes final when a motion for appeal is not filed within 30 days after judgment, and he can no longer obtain an appeal by simply filing a motion for appeal; rather, he must first obtain reinstatement of his right to appeal by way of a properly filed application for post-conviction relief" in a case in which the defendant, convicted of second degree murder, failed to appeal in thirty days); State v. Counterman, 475 So. 2d 336, 339 (La. 1985) (describing the procedure by which "the defendant who has failed to appeal timely should seek reinstatement of his right to appeal in the district court in which the conviction was obtained").

<sup>19</sup> LA. CODE CRIM. PROC. ANN. art. 914.1(A) (2017).

<sup>20</sup> LA. CODE CRIM. PROC. ANN. art. 914.1(B) (2017).

<sup>21</sup> LA. CODE CRIM. PROC. ANN. art. 914.1(D) (2017).

<sup>22</sup> *See* State v. Bernard, 98-994, p. 10 (La. App. 3 Cir. 2/3/99); 734 So. 2d 687, 692 (finding that "LA. CODE CRIM. PROC. art. 914.1 puts the burden on the party requesting the appeal to make sure the record is complete so that the appellate court is able to review the merits of appellant's claim" when a defendant argued that evidence of a prosecutor's

The *record* on appeal consists of all the pleadings, evidence, exhibits, orders, judgments, and necessary portions of the transcript regarding the appeal. Any portion of the transcript that you request but that the court finds unrelated to the appeal will not be prepared.<sup>23</sup> Within five days of making your motion for appeal and your request for the transcript, the State may also write to request portions of the transcript it finds necessary to oppose your appeal.<sup>24</sup>

Preparing these transcripts costs money. Be aware. Unless you have indigent circumstances and cannot afford the costs, you must pay the court reporter or the appropriate agency for the trial court's preparation of the transcript.<sup>25</sup> Filing the appeal also costs money, which must be paid in the appellate court.<sup>26</sup> Please consult with the courts to determine these non-fixed costs. Otherwise, both payments must be made within twenty days of the mailing of notice.<sup>27</sup> Failure to pay these costs can result in a monetary fine under five hundred dollars or even in a dismissal of your appeal.<sup>28</sup>

#### D. ACTIONS ON YOUR MOTION TO APPEAL

After you make your motion to appeal, you must forward notice to the appropriate appellate court that a motion for appeal has been made within seven days of the date you make your motion.<sup>29</sup> This is so that all parties interested in your appeal receive proper notification about your appeal.

Also, after you make your motion to appeal, the trial court has seventy-two hours to either grant or deny your motion.<sup>30</sup> This time limit does not include legal holidays. If your motion for appeal is granted, the court will assign you a return date. The return date is the date on which your court appearance is scheduled. The return date in Louisiana courts will be seventy-five days, unless the trial judge fixes a lesser period.<sup>31</sup> On this date, either you or your attorney will need to appear before the court, unless the court has indicated that the matter will be dealt with on submission, or in writing. You may request one extension of the return date of not more than thirty days.<sup>32</sup> The trial court would have to grant that request. It cannot do so if the return date has passed.<sup>33</sup> Additionally, an extension for the return date can only be granted if the moving party can prove that additional time is necessary due to certain circumstances that would create an unusual and undue hardship.<sup>34</sup> The appellate court can grant any other extensions for your return date for sufficient cause or at the request of the court reporter.<sup>35</sup>

Once the order of the appeal is entered, the trial court's jurisdiction "divests" (transfers) to the appellate court assigned to the district in which you were convicted.<sup>36</sup> In other words, the trial court loses its authority over your case and will no longer have the jurisdiction to take any action on it, except in limited situations laid out in the law.

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improper remarks existed in the record, but did not provide the transcripts to support that claim on appeal); *State v. Ronquille*, 09-81, pp. 9–10 (La. App. 5 Cir. 5/26/09); 16 So. 3d 411, 416 (holding that "the party making the motion for appeal bears the burden of furnishing the appellate court with a record of the trial proceedings needed for review; and therefore, any inadequacy of the record is imputable to the appellant" when the defendant claimed that the appellate court's review of his appeal should be reversed because the court did not have the full transcript from his first trial).

<sup>23</sup> LA. CODE CRIM. PROC. ANN. art. 914.1(B) (2017).

<sup>24</sup> LA. CODE CRIM. PROC. ANN. art. 914.1(A) (2017).

<sup>25</sup> LA. CODE CRIM. PROC. ANN. art. 914.1(C)(2) (2017); LA. CODE CRIM. PROC. ANN. art. 914.1(C)(2) (2017).

<sup>26</sup> LA. CODE CRIM. PROC. ANN. art. 914.1(C)(2) (2017).

<sup>27</sup> LA. CODE CRIM. PROC. ANN. art. 914.1(C)(2) (2017).

<sup>28</sup> LA. CODE CRIM. PROC. ANN. art. 914.1(C)(3) (2017).

<sup>29</sup> LA. CODE CRIM. PROC. ANN. art. 915(B) (2017).

<sup>30</sup> LA. CODE CRIM. PROC. ANN. art. 915(A) (2017).

<sup>31</sup> LA. CODE CRIM. PROC. ANN. art. 915(A) (2017).

<sup>32</sup> LA. CODE CRIM. PROC. ANN. art. 915.1(A) (2017).

<sup>33</sup> LA. CODE CRIM. PROC. ANN. art. 915.1(A) (2017).

<sup>34</sup> LA. CODE CRIM. PROC. ANN. art. 915.1(A) (2017).

<sup>35</sup> LA. CODE CRIM. PROC. ANN. art. 915.1(B) (2017).

<sup>36</sup> LA. CODE CRIM. PROC. ANN. art. 916 (2017).

## E. PRESERVING YOUR RIGHT TO APPEAL

### 1. Preservation

To have an issue reviewed by an appellate court, the issue must be preserved at trial.<sup>37</sup> In the state of Louisiana, it is enough that your attorney objects to any irregularity or error when it occurs.<sup>38</sup> A “bill of exceptions” is unnecessary. If your attorney made timely objections, then, on your appeal, you only need to file a written designation of the errors which you want to raise in appeal with the appellate court.<sup>39</sup> The appellate court will only consider issues and objections raised at trial.

Other issues and objections will only be considered if an error can be found from a mere inspection of the pleadings and proceedings, without having to inspect the evidence (in other words, “patent errors”).<sup>40</sup> This is not a preferred route for your appeal. Taking this path will make it very difficult for your appeal to be successful. You or your attorney must be careful to bring your complaint to the attention of the trial court at the time of your trial, so that the trial court has a chance to address your complaint.<sup>41</sup>

The courts will find the failure to timely object during trial inexcusable and will prevent that issue from being reviewable on appeal. Merely submitting an “assignment of error” for the court’s consideration will not be enough.<sup>42</sup> The assignment of error must be argued either orally or in writing. Otherwise, it will be disregarded and therefore unavailable for appeal.<sup>43</sup> It is also important that you object to any errors at the time that they happen during your trial.<sup>44</sup> A timely objection is required to call the trial judge’s attention to an error at a time when the error can be corrected.<sup>45</sup> This requirement of a timely objection (otherwise known as the “contemporaneous objection rule”) also prevents defendants from “sitting out” an error, gambling unsuccessfully on the verdict, and then later trying to appeal based on an error which could have been corrected at trial.<sup>46</sup> In some states, in capital cases, the only exception is if the record shows that injustice was done to the defendant and he did not receive a fair trial.<sup>47</sup>

Regardless, “patent” errors (or errors that can be found looking only at the pleadings and proceedings, and without having to inspect the evidence) do happen.<sup>48</sup> Some examples of patent errors include imposing an illegal sentence,<sup>49</sup> a trial by an incorrect number of jurors,<sup>50</sup> a failure to rule on a motion for a new trial before imposing a sentence,<sup>51</sup> an erroneous indictment,<sup>52</sup> a failure to properly advise a defendant of his constitutional rights when entering a plea of guilty,<sup>53</sup> and a failure to determine if the defendant knowingly and voluntarily waived any of his or her waivable rights (rights you can waive, or give up).<sup>54</sup> A guilty plea waives three federal constitutional rights: the privilege against self-incrimination, the

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<sup>37</sup> See *State v. Richards*, 426 So. 2d 1314, 1318 (La. 1982).

<sup>38</sup> LA. CODE CRIM. PROC. ANN. art. 841(A) (2017).

<sup>39</sup> LA. CODE CRIM. PROC. ANN. art. 844(A) (2017).

<sup>40</sup> See *State v. Richards*, 426 So. 2d 1314, 1318 (La. 1982).

<sup>41</sup> See *e.g.*, *State v. Morrison*, 582 So. 2d 295, 304 (La. App. 1 Cir. 1991) (holding that by failing to enter any objection to testimony repeating victim’s statement, defendant failed to preserve alleged error on appeal).

<sup>42</sup> See *State v. Morgan*, 333 So. 2d 642, 643 n.1 (La. 1976).

<sup>43</sup> See *State v. Morgan*, 333 So. 2d 642, 643 n.1 (La. 1976).

<sup>44</sup> LA. CODE CRIM. PROC. ANN. art. 841(A) (2017).

<sup>45</sup> *State v. Arvie*, 505 So. 2d 44, 47 (La. 1987).

<sup>46</sup> See *State v. Mart*, 419 So. 2d 1216, 1219 (La. 1982).

<sup>47</sup> *State v. White*, 192 So. 345, 349 (La. 1939).

<sup>48</sup> LA. CODE CRIM. PROC. ANN. art. 920 (2017).

<sup>49</sup> LA. CODE CRIM. PROC. ANN. art. 882(A) (2017) (“An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review.”); see also *State v. Delaney*, 359 So. 2d 976, 977 (La. 1978).

<sup>50</sup> *State v. Kibodeaux*, 524 So. 2d 891, 892 (La. App. 3 Cir. 1988) (finding a procedural defect in trial by a jury of 11 instead of 12).

<sup>51</sup> LA. CODE CRIM. PROC. ANN. art. 853 (2017) (“A motion for a new trial must be filed and disposed of before sentence.”); see also *State v. Stevenson*, 525 So. 2d 281, 282 (La. App. 1 Cir. 1988).

<sup>52</sup> See *State ex rel. Jackson v. Henderson*, 283 So. 2d 210, 211 (La. 1973).

<sup>53</sup> See *State v. Pittman*, 585 So. 2d 591, 596 (La. App. 5 Cir. 1991).

<sup>54</sup> See *State v. Studivant*, 531 So. 2d 539, 542 (La. App. 5 Cir. 1988).



right to a trial by jury, and the right to confront your accusers.<sup>55</sup> The right to be assisted by counsel is another waivable right.<sup>56</sup>

If you find a “patent” error on the face of the record, the appellate court will be able to consider it any time.<sup>57</sup> Therefore, you do not need to worry about preserving patent errors for the appellate court to review. In fact, Courts of Appeals routinely review the record for patent errors regardless of whether you make a request to do so.<sup>58</sup> Still, if you request that your record be reviewed for patent errors, a Court of Appeal will perform an independent and thorough review of the following: all the pleadings filed in district court, all the minute entries of district court proceedings, the bill of information, and all the transcripts contained in the appeal record.<sup>59</sup> So, requesting a patent error review may make sense.

## 2. Plea Agreements

If you plead guilty or *nolo contendere* (no contest), the court, within its discretion, may allow you to withdraw your plea of guilty any time before sentencing.<sup>60</sup> Otherwise, you generally cannot appeal. If you do decide to plead guilty or *nolo contendere* in a misdemeanor case and if you are not represented by counsel, the court will follow a series of steps. First, the court will personally determine in open court that your plea is voluntary and that it is made with an understanding of the nature of your charge, as well as with an understanding of your right to be represented by counsel.<sup>61</sup> Only after this determination will the court accept your guilty plea. If the court, however, determines either that a sentence of imprisonment will actually be imposed on you or that your conviction can be used to enhance the grade (severity) of a later offense, then the court will first address you personally in open court and determine that you understand all of the following:

- 1) The nature of the charge to which your plea is offered, as well as the mandatory minimum and maximum penalty provided by law;
- 2) Your right to be represented by an attorney;
- 3) Your right to have a trial;
- 4) Your right to confront and cross-examine witnesses and your right not to be forced to incriminate yourself; and
- 5) That your plea of guilty or *nolo contendere* will result in no further trial of any kind, so that by pleading guilty or *nolo contendere* you are waiving your right to trial<sup>62</sup>

In a felony case, the court will also address you personally in an open court. There, the court will inform you of the above-listed rights that you waive and the consequences you face when you plead guilty or *nolo contendere*. Before accepting your plea of guilty or *nolo contendere*, the court will also make sure personally in an open court that your plea is voluntary and not the result of force, threats, or promises apart from a plea agreement. The court will also ask if your willingness to plead guilty or *nolo contendere* is a result of discussions you had among yourself, your attorney, and the district attorney. If these discussions occurred, then the court will require a disclosure of that discussion and agreement in open court or *in camera* (privately) when the plea was offered.

If you plead guilty without having been made aware of these above-mentioned rights or consequences at the time of your plea, then your guilty plea may not be valid. For example, the failure of a trial court to advise a defendant of the mandatory minimum sentence before accepting a guilty plea may be raised by the defendant as an error on appeal. However, this may be subject to analysis under the harmless

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<sup>55</sup> See *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274 (1969).

<sup>56</sup> See *Montejo v. Louisiana*, 556 U.S. 778, 786, 129 S. Ct. 2079, 2085, 173 L. Ed. 2d. 955 (2009).

<sup>57</sup> See *State v. Buttner*, 411 So. 2d 35, 37 (La. 1982).

<sup>58</sup> See *State v. Jackson*, 2007-0985, p. 12 (La. App. 5 Cir. 4/15/08); 985 So. 2d 246, 253.

<sup>59</sup> See *State v. Broussard*, 581 So. 2d 763, 765 (La. App. 4 Cir. 1991).

<sup>60</sup> LA. CODE CRIM. PROC. ANN. art. 559(A) (2017).

<sup>61</sup> LA. CODE CRIM. PROC. ANN. art. 556(A) (2017).

<sup>62</sup> LA. CODE CRIM. PROC. ANN. art. 556.1(A) (2017); LA. CODE CRIM. PROC. ANN. art. 556(B) (2017).

error rule.<sup>63</sup> The rule states that your guilty plea will *not* be invalidated if the difference between the procedures the court followed and the procedures that they should have followed did *not* affect your *substantial* rights.<sup>64</sup> What the courts consider a substantial right is discussed more in Part F of this Chapter. To sum up, if you plead guilty in the state of Louisiana, you cannot appeal your sentence unless you find a patent error that affects your substantial right.

## F. WHEN YOU SHOULD BRING AN APPEAL

In an appeal, you ask the appellate court to correct the trial court's error in its judgment or sentence. The appellate court will then decide to revise, modify, set aside, reverse, or affirm the judgment or sentence against you.<sup>65</sup> However, you cannot bring an appeal on just any issue. It must be from a final judgment. Part B of this chapter covers this topic.<sup>66</sup> Know that a final judgment is one which puts an end to the proceedings.<sup>67</sup> In other words, your appeal may only be brought to challenge a judgment that ultimately disposes of, or finishes, the case.<sup>68</sup> For example, an order granting a new trial does not finally dispose of a case and will therefore not be appealable.<sup>69</sup> You can appeal from a final judgment of a conviction only when you have been given a sentence.<sup>70</sup>

Secondly, only two types of errors will be considered on appeal: (1) an error designated in the assignment of errors (*see below*) and (2) an error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence.<sup>71</sup> An "assignment of errors" is a written report of the errors which are to be argued on appeal. This written report is to be filed with the appellate court, and filed in accordance with the uniform rules of the appropriate appellate court. It is important that you have preserved these issues for appeal, as discussed in Part E of this chapter. Errors that are discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence are called "patent" errors. This is discussed in detail in the latter half of Part E of this chapter.

Finally, the judgment or ruling you are appealing must affect a substantial right of yours. In other words, the judgment or ruling must amount to more than a harmless error.<sup>72</sup> So not every violation of your rights by the trial court will automatically lead the appellate court to grant a reversal of that judgment. To put it in another way, the trial court having denied you a statutory right does not automatically lead to a reversal.<sup>73</sup> Rather, courts have held that when statutory rights are denied, a reversal is required only if the substantial rights of the accused are affected.<sup>74</sup>

The same is true for constitutional rights as well.<sup>75</sup> The error in your case must be found to be both substantial and prejudicial in order for you to appeal it.<sup>76</sup> To show that your substantial rights were affected,

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<sup>63</sup> State v. Snow, 36,826, p. 2 (La. App. 2 Cir. 3/5/03); 839 So. 2d 988, 990 (holding that a failure of a trial court to advise a defendant of the mandatory minimum sentence, if raised as an assignment of error on appeal, is subject to analysis under the harmless error rule).

<sup>64</sup> See LA. CODE CRIM. PROC. ANN. art. 556(D) (2017); *see also* LA. CODE CRIM. PROC. ANN. art. 556.1(E) (2017).

<sup>65</sup> LA. CODE CIV. PROC. art. 2082 (2017).

<sup>66</sup> LA. CODE CRIM. PROC. ANN. art. 912(C)(1) (2017).

<sup>67</sup> State v. Quinones, 94-0436 p. 3 (La. App. 5 Cir. 11/29/94); 646 So. 2d 1216, 1217 (holding that the conviction was not final and thus not appealable because the defendant had not yet been sentenced).

<sup>68</sup> State v. Carter, 44 So. 997, 997, 120 La. 96, 96-97 (La. 1907) (denying an appeal from an order refusing the defendant bail upon an indictment for murder).

<sup>69</sup> See State v. White, 21 So. 2d 877, 877 (La. 1945).

<sup>70</sup> See State v. London, 316 So. 2d 743, 743 (La. 1975).

<sup>71</sup> LA. CODE CRIM. PROC. ANN. art. 920 (2017).

<sup>72</sup> LA. CODE CRIM. PROC. ANN. art. 921 (2017).

<sup>73</sup> State v. Ardoin, No. 58318, p. 8 (La. 12/13/76); 340 So. 2d 1362, 1365 ("Not every violation of a statutory right therefore must result in reversal of a conviction.")

<sup>74</sup> See State v. Williams, 2000-0011, p. 23 (La. App. 4 Cir. 5/09/01); 788 So. 2d 515, 527.

<sup>75</sup> See State v. McLeod, 6 So. 2d 146, 148 (La. 1942); 199 La. 372, 378.

<sup>76</sup> State v. McLeod, 6 So. 2d 146, 148 (La. 1942); 199 La. 372, 378 ("Error in a criminal case must be substantial and prejudicial in order to afford ground for a reversal and, while the accused is entitled to be protected against an invasion of the rights guaranteed to him by the Constitution, these rights may not be employed, on a pretext, as a shield to thwart the process of justice.").

you must show that you were prejudiced in your case.<sup>77</sup> Prejudice will not be presumed from just the fact that the error had been committed. You must affirmatively show that you were prejudiced due to the error.<sup>78</sup> When an error has been found to not affect your substantial right, courts call such an error a harmless error. Courts have found errors to be harmless when they conclude that the trial record still establishes guilt beyond a reasonable doubt.<sup>79</sup> Courts have also found an error to be harmless if there is little likelihood that the error would have changed the result.<sup>80</sup> For example, in one case, there was an error by the court because the court admitted a hearsay statement. The appellate court, however, found the error to be harmless because the defendant who was accused of murder had admitted to firing the shot that went into the victim's back and killed the victim.<sup>81</sup>

You can also bring an appeal if you believe that your right to effective assistance of counsel was not met. In Louisiana, you can challenge the effectiveness of your trial counsel or your appeals counsel. It is your burden to prove by a "preponderance of the evidence" that your counsel was constitutionally deficient, or lacking, in your representation. The details on how to prove such a burden are listed in Section H(1)(e) of this chapter. Detailed discussion of ineffective assistance of counsel claims have been reserved for Section H, which centers on post-conviction relief. In Louisiana, courts have often recommended that a claim of ineffective assistance of counsel be brought as an application for post-conviction relief.<sup>82</sup> This is so that your claim can be heard in a full evidentiary hearing, where you will be able to present evidence.<sup>83</sup>

## G. DETERMINATION OF THE APPEAL

Your motion for appeal will not suspend the execution of your sentence.<sup>84</sup> In other words, you will generally have to begin serving your sentence while waiting for your appeal to be decided. Still, you will earn credit for the time you serve while you wait for the court to make a decision on your appeal.<sup>85</sup> This does not apply to you, however, if you are admitted to post-conviction bail.<sup>86</sup> Therefore, you should not be discouraged from appealing in fear that you will not receive credit for your time spent in jail pending your appeal.

If your first appeal is in the Court of Appeal and it is not successful, you may be able to pursue your claim in a higher court.<sup>87</sup> Both you and the State can apply to the same Court of Appeal for a rehearing within fourteen days of mailing the notice of the judgment and opinion on your appeal.<sup>88</sup> Also, both you and the State can apply to the Supreme Court of Louisiana for permission to appeal through a "writ of certiorari" (an order by a higher court directing a lower court to send the record of a case for review) within thirty days

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<sup>77</sup> *State v. Jarrell*, 2007-1720 p. 15 (La. App. 1 Cir. 09/12/08); 994 So. 2d 620, 632 (holding that the prejudicial effect on defendant did not rise to the level of undue prejudice to establish that the defendant's trial of two or more crimes in a single proceeding affected his substantial rights).

<sup>78</sup> *See State v. Pierfax*, 105 So. 16, 18, 158 La. 927, 932 (La. 1925).

<sup>79</sup> *See State v. Hall*, 606 So. 2d 972, 980 (La. App. 3 Cir. 1992).

<sup>80</sup> *State v. Ferdinand*, 441 So. 2d 1272, 1274 (La. App. 1 Cir. 1983).

<sup>81</sup> *See State v. Taylor*, 2001-1638, p. 21-22 (La. 1/14/03); 838 So. 2d 729, 748.

<sup>82</sup> *See* LA. PRAC. CRIM. TRIAL PRAC. § 28:6 (4th ed., 2017) ("If a person's claim is that he was represented by incompetent or ineffective assistance of counsel at trial, he can usually only raise it by post-conviction petition since that provides for an evidentiary hearing to air the complaint. Likewise, a claim of incompetent counsel raised on appeal is likely to be deferred to post-conviction proceedings since the appellate record usually is inadequate to review the complaint.").

<sup>83</sup> *See* LA. PRAC. CRIM. TRIAL PRAC. § 28:6 (4th ed., 2017) ("If a person's claim is that he was represented by incompetent or ineffective assistance of counsel at trial, he can usually only raise it by post-conviction petition since that provides for an evidentiary hearing to air the complaint. Likewise, a claim of incompetent counsel raised on appeal is likely to be deferred to post-conviction proceedings since the appellate record usually is inadequate to review the complaint.").

<sup>84</sup> LA. CODE CRIM. PROC. ANN. art. 913(B) (2017).

<sup>85</sup> *See Hart v. Henderson*, 449 F.2d 183, 185 (5th Cir. 1971).

<sup>86</sup> LA. CODE CRIM. PROC. ANN. art. 913(B) (2017).

<sup>87</sup> LA. CODE CRIM. PROC. ANN. art. 922(A) (2017).

<sup>88</sup> LA. CODE CIV. PROC. ANN. art. 2166(A) (2017).

of the mailing of the notice of judgment and opinion of the Court of Appeal.<sup>89</sup> However, you *cannot* apply for a writ of certiorari without first applying for a rehearing in the Court of Appeal.<sup>90</sup>

If you do file a timely application to the Court of Appeal for a rehearing, then the time limit for you and the State to apply to the Supreme Court of Louisiana for a writ of certiorari is extended until thirty days after the mailing of the denial of rehearing notice.<sup>91</sup> If neither the application to the Court of Appeal nor the application to the Supreme Court of Louisiana is filed in a timely manner, then the judgment of the Court of Appeal becomes final.<sup>92</sup> These time limits are *extremely* important.

If your timely application for a rehearing in the Court of Appeal is denied, then the judgment will become final and definitive unless you file an application for a writ of certiorari to the Supreme Court of Louisiana within the thirty days as described above.<sup>93</sup> If an application for certiorari to the Supreme Court of Louisiana is timely filed, then the judgment becomes final and definitive five days after the Supreme Court's denial of certiorari.<sup>94</sup> Please note that you must be mindful to preserve issues also in your appellate hearings, as discussed in Part E of this chapter, which deals with the "assignment of errors." This is because the Court of Appeal will not give you a new hearing to consider a point that was not raised at your first hearing.<sup>95</sup>

If your appeal is in the Supreme Court of Louisiana and it is not successful, you may apply to the court and ask for a rehearing. You must apply within fourteen days from the day when the notice of judgment is mailed.<sup>96</sup> No higher court in Louisiana exists. Thus, your claim stops there. If you do not apply for a rehearing on time, the judgment of the Supreme Court of Louisiana becomes final.<sup>97</sup> If you do apply on time, the judgment becomes final when the application is denied.<sup>98</sup>

If the Supreme Court of Louisiana decides not to hear your appeal, you may still have other chances for relief. First, if your case involves issues of federal law, you can apply for a writ of certiorari to the United States Supreme Court.<sup>99</sup> In a writ of certiorari, you are asking the United States Supreme Court to review a lower court's decision. However, the United States Supreme Court rarely grants such cases. Second, in some circumstances, you may be able to challenge your conviction or sentence through post-conviction relief proceedings. These are discussed further in Section H of this chapter.

## H. POST-CONVICTION RELIEF

If you are seeking to have a conviction and offense set aside, you will most likely be applying for post-conviction relief.<sup>100</sup> The post-conviction relief process in Louisiana occurs post-appeal.<sup>101</sup> In other words, you cannot apply for post-conviction relief if you are still able to appeal the conviction or sentence. You also cannot apply for post-conviction relief if an appeal is pending on your case.<sup>102</sup>

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<sup>89</sup> LA. CODE CIV. PROC. ANN. art. 2166(A) (2017).

<sup>90</sup> *State v. Moore*, 143 So. 707, 708, 175 La. 607, 609 (La. 1932) (holding that the Supreme Court of Louisiana's right to issue certiorari to the Court of Appeal will not be exercised unless applied for within 30 days after a rehearing was refused by the Court of Appeal).

<sup>91</sup> LA. CODE CIV. PROC. ANN. art. 2166(B) (2017).

<sup>92</sup> LA. CODE CIV. PROC. ANN. art. 2166(A) (2017).

<sup>93</sup> LA. CODE CIV. PROC. ANN. art. 2166(C) (2017).

<sup>94</sup> LA. CODE CIV. PROC. ANN. art. 2166(E) (2017).

<sup>95</sup> *See Stephens v. Duckett*, 36 So. 89, 91, 111 La. 979, 982–983 (La. 1904).

<sup>96</sup> LA. CODE CIV. PROC. ANN. art. 2167(A) (2017).

<sup>97</sup> LA. CODE CIV. PROC. ANN. art. 2167(B) (2017).

<sup>98</sup> LA. CODE CIV. PROC. ANN. art. 2167(C) (2017).

<sup>99</sup> Violations of the U.S. Constitution present issues of federal law. *See* 28 U.S.C. § 1331 (2012).

<sup>100</sup> LA. CODE CRIM. PROC. ANN. art. 924 (2017).

<sup>101</sup> LA. CODE CRIM. PROC. ANN. art. 924.1 (2017).

<sup>102</sup> LA. CODE CRIM. PROC. ANN. art. 924.1 (2017). *See State v. Rolland*, 96-11, p. 3 (La. App. 5 Cir. 4/30/96); 673 So. 2d 1229, 1230 (holding that post-conviction relief was the appropriate procedural vehicle for defendant to seek to exercise his right to appeal after the time for appealing has elapsed).

### 1. Time Limits for Post-Conviction Relief

You may file a petition for post-conviction relief with the District Court where your conviction took place. There are strict time limits for when courts will consider an application for post-conviction relief. If it has been more than two years since the judgment of conviction and sentence has become final, the court will not consider a post-conviction relief application.<sup>103</sup> However, there are two exceptions to this rule:

- 1) Your application shows that at the time of your criminal case, you or your attorney did not know the facts which your case was based upon. You must be able to prove or the state must admit that you were not aware of those facts.<sup>104</sup> One example of this could happen if there was evidence that the state suppressed material evidence at trial and you and your attorney did not become aware of that evidence until after the time limit for appeal expired; or<sup>105</sup>
- 2) Your conviction carries a death sentence.<sup>106</sup>

Unless one of these provisions applies to you, make sure to bring your application for post-conviction relief within two years after your conviction and sentence became final.

Furthermore, the court may dismiss your post-conviction relief application even if it is filed on time (or allowed under one of the above listed exceptions). Your application will be dismissed if the court finds that the state's ability to respond to your claims has been materially prejudiced by events not under the control of the state since the date of your original conviction.<sup>107</sup>

#### a. Proving Your Claim for Post-Conviction Relief

Attempting to attain post-conviction relief is an uphill battle. You should not consider it as an alternative route to your appeal rights. Indeed, post-conviction relief is your **last resort!** You must make sure to take your appeal rights very seriously. Be extremely thorough in exhausting your appeal rights before you bring any application for post-conviction relief.

The burden of proving the post-conviction relief that you seek is on you as the petitioner.<sup>108</sup> First, in order to prevent your application from being dismissed, your application must bring a claim, which if established, would entitle you to relief.<sup>109</sup> Secondly, your relief will only be granted on the following grounds:

- 1) Your conviction was obtained in violation of the Constitution of the United States or the state of Louisiana;
- 2) The court exceeded its jurisdiction (the case never should have been before that particular court);
- 3) The conviction or sentence subjected you to double jeopardy (you were tried more than once for the same crime);
- 4) The limitations on the institution of prosecution had expired;
- 5) The statute creating the offense for which you were convicted and sentenced is unconstitutional;
- 6) The conviction or sentence constitutes the *ex post facto* (retroactive; after the fact) application of law in violation of the constitution of the United States or the state of Louisiana; or

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<sup>103</sup> LA. CODE CRIM. PROC. ANN. art. 930.8(A) (2017).

<sup>104</sup> State v. Parker, 98-0256, p. 1 (La. 05/08/98); 711 So. 2d 694, 695 (holding that a late realization that an error may have occurred at trial does not qualify as discovery of a new fact).

<sup>105</sup> State *ex rel.* Winn v. State, 95-0898, p. 1 (La. 10/02/96); 685 So. 2d 104, 104 (finding that claim fell under the statute providing exception to the three-year time limit for filing applications for post-conviction relief, where defendant alleged that the state suppressed material, exculpatory evidence at trial in violation of *Brady* and that defendant and his attorney did not know until defendant obtained documents pursuant to the Public Records Act).

<sup>106</sup> LA. CODE CRIM. PROC. ANN. art. 930.8(A) (2017)

<sup>107</sup> LA. CODE CRIM. PROC. ANN. art. 930.8(B) (2017).

<sup>108</sup> LA. CODE CRIM. PROC. ANN. art. 930.2 (2017).

<sup>109</sup> LA. CODE CRIM. PROC. ANN. art. 928 (2017).

- 7) The results of DNA testing (performed pursuant to an application granted under Article 926.1 of the Louisiana Code of Criminal Procedure) prove by clear and convincing evidence that the petitioner is factually innocent of the crime for which he or she was convicted.<sup>110</sup>

The seventh ground upon which post-conviction relief can be granted is further discussed in Section H(1)(d) of this chapter.

Finally, a claim for relief that has already been fully litigated in your appeal from your judgment of conviction and sentence will not be considered again in your post-conviction application.<sup>111</sup> The courts do not want to allow the re-litigation or reconsideration of issues that have already been fully litigated. That said, in the interests of justice, the court may find that re-litigation, in certain situations, is required.<sup>112</sup> This, however, should not give you any reason to wait for your post-conviction relief procedure to bring certain claims. Therefore, the courts will also deny your application for post-conviction relief if your application brings a claim which you could have raised, but inexcusably failed (didn't have a reason for not bringing earlier) to raise in the proceedings leading to your original conviction.<sup>113</sup> This also applies for any claim you inexcusably failed to bring on your appeal.<sup>114</sup>

For any application for post-conviction relief that follows after a previous application ("successive applications"), such an application will be dismissed if it fails to raise a new or different claim.<sup>115</sup> Also, a successive application will be dismissed if it raises a new or different claim that the prior application inexcusably omitted.<sup>116</sup> So, when you first apply for post-conviction relief, you want to state *all* your known claims for which you intend to seek relief. Also, if you plan to submit a successive application, make sure that you have a new claim (for which you have an excuse for not having included in your first application) instead of attempting to merely reargue previous matters.

If the court does consider dismissing your application because you failed to raise the claim in (a) the proceedings leading to your original conviction and sentence, (b) your appeal from that conviction or sentence, or (c) a prior application for post-conviction relief, then the court will order you to state your reasons for such a failure.<sup>117</sup> If the court then finds that your failure is excusable, it will consider the merits of your claim.<sup>118</sup>

#### b. Procedural Process for Post-Conviction Relief

This section contains further information on how to handle the procedures for your post-conviction challenges for relief. As stated earlier, you may apply for post-conviction relief in the parish in which you were convicted.<sup>119</sup> Be sure to remember, however, that you can only do this after exhausting all your appeal rights related to the conviction at hand. In Louisiana, a "parish" is a territorial division similar to a county in other states.

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<sup>110</sup> LA. CODE CRIM. PROC. ANN. art. 930.3 (2017).

<sup>111</sup> LA. CODE CRIM. PROC. ANN. art. 930.4(A) (2017).

<sup>112</sup> LA. CODE CRIM. PROC. ANN. art. 930.4(A) (2017); *see* LA. PRAC. CRIM. TRIAL PRAC. § 28:6 (4th ed., 2017) ("In *State ex rel. Ferrand v. Blackburn*, the petitioner applied for post-conviction relief alleging the evidence was insufficient to prove an essential element of the offense. The petitioner had failed to raise the issue on appeal. However, the state supreme court did not hesitate to review the claim (and in fact grant relief) since a conviction based on insufficiency of evidence is a violation of constitutionally guaranteed due process. Post-conviction relief has also been granted to persons challenging the validity of multiple offender proceedings based on prior convictions by five-member juries, regardless of whether the issue was raised in earlier proceedings.").

<sup>113</sup> LA. CODE CRIM. PROC. ANN. art. 930.4(B) (2017).

<sup>114</sup> LA. CODE CRIM. PROC. ANN. art. 930.4(C) (2017).

<sup>115</sup> LA. CODE CRIM. PROC. ANN. art. 930.4(D) (2017).

<sup>116</sup> LA. CODE CRIM. PROC. ANN. art. 930.4(E) (2017).

<sup>117</sup> LA. CODE CRIM. PROC. ANN. art. 930.4(F) (2017).

<sup>118</sup> LA. CODE CRIM. PROC. ANN. art. 930.4(F) (2017).

<sup>119</sup> LA. CODE CRIM. PROC. ANN. art. 925 (2017).

The application itself must be a written petition addressed to the proper district court for the parish in which you were convicted.<sup>120</sup> You must also attach a copy of the judgment of conviction and sentence.<sup>121</sup> If you have requested but have been unable to receive such a copy, you may allege that a copy has been demanded and refused. You must state the following on the petition: name of person in custody, name of custodian, the grounds upon which relief is sought, statement of all prior applications for writs of habeas corpus or for post-conviction relief filed by or on behalf of yourself, and all errors known or discoverable by the exercise of due diligence.<sup>122</sup>

Please be sure to use the uniform application for post-conviction relief approved by the Supreme Court of Louisiana because the court may require its use. This uniform application can be found in Appendix A of the Louisiana Supreme Court Rules. Make sure to be thorough. Any inexcusable failure, on your part, to comply with these provisions can potentially be a reason for dismissal of your application.<sup>123</sup> Finally and most importantly, if your application fails to bring a claim that if proven would entitle you to relief, then the court will dismiss your application.<sup>124</sup>

A court may appoint you counsel for one of a few reasons. As a petitioner, if you are found to have shown a legitimate claim that can entitle you to relief and if you need counsel, the court may then appoint you counsel.<sup>125</sup> The court may also appoint counsel when it orders an evidentiary hearing, authorizes a deposition, or authorizes requests for admissions of fact or genuineness of a document.<sup>126</sup> The trial court has the discretion to appoint counsel based upon the statements contained in the petitioner's pleadings alone.<sup>127</sup>

More importantly, if you allege a valid claim that can potentially entitle you to relief, the court will order the district attorney in the parish in which you were convicted to file any procedural objections he has to your claim. The court will order that this be done within a specified period of time—no longer than thirty days.<sup>128</sup> If there are no procedural objections, the district attorney will be asked to answer on the fundamental facts and issues with the case within thirty days.<sup>129</sup> However, if procedural objections are filed on time, then no answer on the merits of the claim can be ordered until the procedural objections have been considered and ruled upon.<sup>130</sup> After the state has been given its opportunity to answer, the court may order an evidentiary hearing. You are entitled to be present at the evidentiary hearing if one is ordered.<sup>131</sup>

An evidentiary hearing may take place if one of your claims, if true, would entitle you to relief. An evidentiary hearing is only required and ordered whenever there are contested questions of fact that cannot be properly resolved on the record.<sup>132</sup> Your record in this case will usually consist of your application, the answer to your application, and any other related supporting documents.

If a hearing is required, you are permitted to be present. You can expressly waive your right to be present, unless the *only* evidence to be received is of the following: duly authenticated records, transcripts, depositions, documents, or portions thereof, or admissions of fact.<sup>133</sup> If you are incarcerated, you can be “present” at such proceedings by teleconference, video link, or other visual remote technology.<sup>134</sup> Additionally, in such a case, you will be provided with copies of the evidence and an opportunity to respond in writing.<sup>135</sup>

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<sup>120</sup> LA. CODE CRIM. PROC. ANN. art. 926(A) (2017).

<sup>121</sup> LA. CODE CRIM. PROC. ANN. art. 926(A) (2017).

<sup>122</sup> LA. CODE CRIM. PROC. ANN. arts. 926(B)(1)–(5) (2017).

<sup>123</sup> LA. CODE CRIM. PROC. ANN. art. 926(E) (2017).

<sup>124</sup> LA. CODE CRIM. PROC. ANN. art. 928 (2017).

<sup>125</sup> LA. CODE CRIM. PROC. ANN. art. 930.7(A) (2017).

<sup>126</sup> LA. CODE CRIM. PROC. ANN. art. 930.7(B) (2017).

<sup>127</sup> State *ex rel.* Cherry v. Cormier, 281 So. 2d 99, 102 (La. 1973).

<sup>128</sup> LA. CODE CRIM. PROC. ANN. art. 927(A) (2017); *see also* State v. Felton, 522 So. 2d 626, 627 (La. App. 4 Cir. 1988).

<sup>129</sup> LA. CODE CRIM. PROC. ANN. art. 927(A) (2017).

<sup>130</sup> LA. CODE CRIM. PROC. ANN. art. 927(A) (2017).

<sup>131</sup> *See* LA. CODE CRIM. PROC. ANN. art. 927(C) (2017); LA. CODE CRIM. PROC. ANN. art. 930(A) (2017).

<sup>132</sup> LA. CODE CRIM. PROC. ANN. art. 930(A) (2017).

<sup>133</sup> LA. CODE CRIM. PROC. ANN. art. 930(A) (2017); LA. CODE CRIM. PROC. ANN. art. 930(B) (2017).

<sup>134</sup> LA. CODE CRIM. PROC. ANN. art. 930.9 (2017).

<sup>135</sup> LA. CODE CRIM. PROC. ANN. art. 930(A) (2017).

Still, the court may find that it can grant or deny relief through a summary disposition.<sup>136</sup> This means that the court can determine that the factual and legal issues can be decided from just your application, the answer, and supporting documents (for example, relevant transcripts, depositions, and other reliable documents you and your opposing party have submitted).<sup>137</sup> When there is no evidentiary hearing, the court may take oral depositions (out-of-court testimonies) under conditions specified by the court simply for good cause.<sup>138</sup> This might include taking a statement from you at the prison. The court may also authorize requests for admissions of fact (written requests for facts you and your opposing party agree upon).<sup>139</sup>

If the court grants relief under your application for post-conviction relief, the process is not over, but you will have overcome the most difficult part of the process. Unless the court dismisses the charges against you and acquits you, the State may be permitted to retry you. If so, the court may order that you be held in custody pending a new trial if it appears that there are legally sufficient grounds upon which to re-prosecute you.<sup>140</sup> However, the court may also grant you bail and order that you be released during the new trial. If the court does find the grounds upon which to re-prosecute you, you will then be entitled to a new trial (in other words, as if you had never been convicted of the offense).<sup>141</sup> If the State decides not to retry you, the charges will be dismissed, and you will be released.

Once the court makes a judgment granting or denying relief, a copy of the judgment along with reasons for the judgment will be given to you (the petitioner), the district attorney, and anybody the court appoints as a custodian (like a court officer or sheriff).<sup>142</sup> There is no right of appeal from judgment denying post-conviction relief. However, if the statute or ordinance is declared unconstitutional, the state may appeal to the Supreme Court of Louisiana.<sup>143</sup>

### c. Writ of Habeas Corpus

Habeas corpus is a process that you can use to argue that the reasons for your imprisonment are not legal. If you do not have the option of appealing your conviction or sentence or you want to challenge your incarceration or the procedures used in convicting and sentencing you, you may turn to the writ of habeas corpus.<sup>144</sup> Be clear, however: habeas corpus is not the proper process for you if you are still able to file applications for post-conviction relief. An application for a writ of habeas corpus will be considered early (and improper) if you do not first exhaust all your appeal rights.<sup>145</sup> Challenging your imprisonment with the writ of habeas corpus is *not the same* as appealing your conviction or sentence. Louisiana state habeas corpus is discussed in Chapter 5 of this Supplement.

The federal courts also have jurisdiction to hear your complaint, by way of a writ of habeas corpus, if you claim that you are being held in violation of the United States Constitution or the laws or treaties of the United States.<sup>146</sup> As with a state habeas corpus claim, you must have exhausted all your available state remedies to be heard on a federal writ of habeas corpus.<sup>147</sup> For more detailed information on habeas corpus, refer to Chapter 13 of the main *JLM*.

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<sup>136</sup> LA. CODE CRIM. PROC. ANN. art. 929 (2017).

<sup>137</sup> LA. CODE CRIM. PROC. ANN. art. 929(A) (2017).

<sup>138</sup> LA. CODE CRIM. PROC. ANN. art. 929(B) (2017).

<sup>139</sup> LA. CODE CRIM. PROC. ANN. art. 929(B) (2017).

<sup>140</sup> LA. CODE CRIM. PROC. ANN. art. 930.5 (2017).

<sup>141</sup> LA. CODE CRIM. PROC. ANN. art. 930.5 (2017).

<sup>142</sup> LA. CODE CRIM. PROC. ANN. art. 930.1 (2017).

<sup>143</sup> LA. CODE CRIM. PROC. ANN. art. 930.6 (2017).

<sup>144</sup> *State v. Lewis*, 350 So. 2d 1197, 1198 (La. 1977) (holding that since the defendant's conviction was affirmed and the defendant did not take any action on the judgment for 14 days, the defendant must bring any additional issues to the attention of the court by application for writ of habeas corpus).

<sup>145</sup> *See State v. Carter*, 463 So. 2d 785, 787 (La. App. 2 Cir. 1985).

<sup>146</sup> 28 U.S.C. § 2254 (2012).

<sup>147</sup> 28 U.S.C. § 2254 (2012).



#### d. DNA Testing

Prisoners in the state of Louisiana have the right to post-conviction DNA testing. “DNA testing” means any method of testing and comparing deoxyribonucleic acid that would be admissible under the Louisiana Code of Evidence.<sup>148</sup>

If currently the date is BEFORE August 31, 2019, or if you have been sentenced to death prior to August 15, 2001, then your application for DNA testing will be filed under the provision of Louisiana Code of Criminal Procedure Article 926.1.<sup>149</sup>

If, however, the current date IS or IS AFTER August 31, 2019, then you may request DNA testing under the rules for filing an application for post-conviction relief as provided in Louisiana Code of Criminal Procedure Article 930.4 or 930.8.<sup>150</sup> Articles 930.4 and 930.8 deal with the validity of your application based on the prior appeal procedures you have taken as the petitioner and the appropriate time limitations. Both sections of the code are discussed in Section H(1) and H(1)(a) of this chapter. Since both Articles 930.4 and 930.8 have been discussed in detail earlier in this chapter, this section will take a close look at Article 926.1 and its provisions. Lastly, an application for post-conviction DNA testing is brought in as part of your application for post-conviction relief. For more information on DNA testing, *see* Chapter 4 of the *Louisiana State Supplement* and Chapter 11 of the main *JLM*.

##### i. Article 926.1 Provisions (BEFORE August 31, 2019)

Under Article 926.1, your application must show the following:

- 1) A factual explanation that demonstrates why there may be an “articulable doubt” as to your guilt, based on clear evidence—whether or not introduced at trial—that DNA testing will resolve the doubt and show your innocence;
- 2) Factual circumstances showing that the timing of application is appropriate;
- 3) Identification of the particular evidence for which you want DNA testing done on; and
- 4) An affidavit stating factual innocence of the crime by the applicant.<sup>151</sup>

To demonstrate why there may be an “articulable doubt,” you must be able to demonstrate with a factual explanation that the doubt is clearly present. You must also be able to show with competent evidence that DNA testing can resolve this doubt. This is a very high standard. Therefore, the court will only allow DNA testing applications under *very* narrow circumstances. For example, courts have held that a claim of an “alternative and inconsistent” theory of defense will not be entertained. This is not considered a claim of actual innocence.<sup>152</sup> In other words, you cannot use DNA testing to just present other possible theories and alternatives to your guilty conviction. DNA testing is not directed towards reweighing the evidence that was used to convict.<sup>153</sup> Further, the mere fact that DNA testing for a particular piece of evidence is available now, but not in the past, does not warrant you relief under Article 926.1.<sup>154</sup> There have been cases where the courts have found DNA testing not permissible because prior evidence in the case was found to be overwhelmingly clear of the defendant’s guilt. So, even a favorable DNA test may not be able to establish your innocence.<sup>155</sup>

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<sup>148</sup> LA. CODE CRIM. PROC. ANN. art. 924 (2017).

<sup>149</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(A) (2017).

<sup>150</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(A) (2017).

<sup>151</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(B) (2017).

<sup>152</sup> *See* State v. Conway, 2001-2808, p. 1 (La. 4/12/02); 816 So. 2d 290, 291.

<sup>153</sup> *See* State v. Robertson, 42,247, p. 1 (La. App. 2 Cir. 6/25/07); 958 So. 2d 787, 788.

<sup>154</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(E) (2017).

<sup>155</sup> State v. Robertson, 42,247, p. 1 (La. App. 2 Cir. 6/25/07); 958 So. 2d 787, 788 (holding that DNA testing was not permissible because evidence in the case was sufficient to support defendant’s conviction for rape and so results of DNA testing would not prove by clear and convincing evidence that defendant was factually innocent of the crime for which he was convicted. Victim in this case was able to see her attacker and later identify him in both photographic and physical lineups; matching fingerprints were also found at the scene).

In addition to showing this “articulable doubt”, you will also need to show that your application was made in a timely manner, what particular evidence you want DNA testing performed on, and lastly, an affidavit (sworn personal statement) stating your factual innocence of your crime.

The court will dismiss any application filed under Article 926.1, unless it finds *all* the following:

- 1) An articulable doubt based on competent evidence as to your guilt;
- 2) A reasonable likelihood that the requested DNA testing will resolve the doubt and establish your innocence as the petitioner;
- 3) That the application has been timely filed; and
- 4) That the evidence to be tested is available and in a condition that would permit DNA testing.<sup>156</sup>

These requirements have been discussed above, but please take note that the court will dismiss your application unless it finds *all* the above-listed requirements. Satisfying a majority of the requirements will not be enough! Furthermore, Article 926.1 expressly states that relief will not be granted if it finds a substantial question as to the integrity of the evidence to be tested.<sup>157</sup> In other words, if the court finds that the evidence has been tampered, altered, or substituted substantially enough to affect its reliability—or even a strong possibility or question of such—then relief will not be granted to you under Article 926.1.

## ii. *Article 926.1 Procedure*

After your application is filed and the court determines where the evidence will be tested, the court will serve a copy of your application to the district attorney and the law enforcement agency that has possession of the evidence you want tested.<sup>158</sup> This agency could be, but is not exclusively, the sheriff, the office of state police, a local police agency, or a crime laboratory.<sup>159</sup> A laboratory mutually agreed upon both by the district attorney and yourself will do the testing.<sup>160</sup> However, if you cannot agree with the district attorney on a testing site, the court will designate a laboratory to perform the tests. That laboratory must be accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) in forensic DNA analysis.<sup>161</sup>

The results of the DNA testing will then be filed by the laboratory with the court and served to you and the district attorney.<sup>162</sup> No evidence that is relevant to your case will be destroyed until the case is finally resolved by the court.<sup>163</sup> No state official or agency will be held civilly or criminally liable if any evidence becomes unavailable or has deteriorated so much that testing cannot be performed. The only exception to this is in the case of willful or wanton misconduct or gross negligence.<sup>164</sup> It is also important for you to know that your DNA profile obtained under Article 926.1 will be sent by the district attorney to the state police to be included in the state DNA database.<sup>165</sup> However, you may seek removal of your DNA record.<sup>166</sup>

## e. Ineffective Assistance of Counsel

Even though Louisiana has the same standards for effective assistance of counsel as federal law, you should always raise your ineffective assistance of counsel claim as both a state claim and a federal

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<sup>156</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(C) (2017).

<sup>157</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(D) (2017).

<sup>158</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(F) (2017).

<sup>159</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(F) (2017).

<sup>160</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(F) (2017).

<sup>161</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(F) (2017).

<sup>162</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(H) (2017).

<sup>163</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(H) (2017).

<sup>164</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(H) (2017).

<sup>165</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(H) (2017).

<sup>166</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(H) (2017).

claim. Indeed, the Louisiana constitution gives you a right to effective assistance from a lawyer.<sup>167</sup> The Sixth and Fourteenth Amendments of the U.S. Constitution also give you a right to effective assistance from a lawyer.<sup>168</sup> Louisiana courts have held that your right to effective assistance of counsel under Louisiana law is the same as your right under federal law.<sup>169</sup> Chapter 12 of the main *JLM* explains this federal law in more detail.

It is important to always raise both state and federal claims because, if you do not, you may not be able to raise them in later proceedings. For example, if you do not present the claim as a federal constitutional violation at the same time when you make your claim that state right to effective counsel was violated, then you may not be able to present the claim in a later federal habeas corpus petition.<sup>170</sup>

Other than the preference of Louisiana courts to hear claims of incompetent counsel in post-conviction proceedings, all the standards for effective assistance of counsel are the same as federal standards. A successful claim of ineffective assistance requires two things. First, your lawyer must have failed to follow professional standards while representing you. Second, there must be a “reasonable probability” that your lawyer’s poor representation negatively affected the outcome of your case.<sup>171</sup> This standard is the same as the federal standard and is often referred to as the *Strickland* test.<sup>172</sup> When considering ineffective assistance of counsel claims, this is the standard that courts often discuss.<sup>173</sup> The negative effect must so serious as to deprive you of a fair trial.<sup>174</sup> You must demonstrate that, but for your counsel’s deficiency or mistakes, the outcome of the trial would have been different.<sup>175</sup> Please look to Chapter 12 of the main *JLM* for a full discussion of the standards for ineffective assistance of counsel.

## I. CONCLUSION

In the state of Louisiana, you have the right to appeal. In an appeal, you ask the appellate court to revise, change, set aside, or reverse a decision of your trial court. There are time limits on when you can appeal. Also, to have an issue reviewed by an appellate court, the issue usually must be made at trial. You can appeal issues that affected your substantial rights and that prejudiced you. You have to appeal to a Court of Appeal before you can try to appeal to the Louisiana Supreme Court. You can try to have your conviction set aside through post-conviction relief. You can apply for post-conviction relief after your appeal is done.

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<sup>167</sup> LA. CONST. art. I, § 13 (“When any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully of . . . his right to the assistance of counsel and, if indigent, his right to court-appointed counsel . . . At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment.”). In addition to the Louisiana constitution, the Louisiana Code of Criminal Procedure also gives you the right to effective help from a lawyer. LA. CODE CRIM. PROC. ANN. art 511 (2017).

<sup>168</sup> The 6th Amendment of the Constitution gives you a federal right “to have the Assistance of Counsel.” U.S. CONST. amend. VI. The 14th Amendment requires all fifty states, including Louisiana, to make sure that you have a lawyer in a criminal trial, unless you do not want one. U.S. CONST. amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342–343, 83 S. Ct. 792, 795–796, 9 L. Ed. 2d 799, 804 (1963). Those two amendments also require that your lawyer is effective in representing you. *Strickland v. Washington*, 466 U.S. 688, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).

<sup>169</sup> *State v. Morrison*, 45,620, p. 18 (La. App. 2 Cir. 11/24/10); 55 So. 3d 856, 867. So, although you have several sources for your right to effective help from a lawyer—including the Louisiana constitution, Louisiana statutes, and the federal Constitution—all of these rights mean the same thing.

<sup>170</sup> For more information on filing a federal habeas corpus claim, see Chapter 13 of the main *JLM*, “Federal Habeas Corpus.”

<sup>171</sup> See *State v. Jenkins*, 2009-1551, pp. 4–5 (La. App. 4 Cir. 6/30/10); 45 So. 3d 173, 176; see also *State v. Sparrow*, 612 So. 2d 191, 199 (La. App. 4 Cir. 1992).

<sup>172</sup> See *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 695–696 (1984).

<sup>173</sup> See *State v. Campbell*, 2008-1226, p. 10 (La. App. 5 Cir. 5/26/09) writ denied, 27 So. 3d 842 (La. 2010); 15 So. 3d 1076, 1082; see also *State v. Jenkins*, 2009-1551, pp. 4–5 (La. App. 4 Cir. 6/30/10); 45 So. 3d 173, 176; *State v. Morrison*, 45,620, p. 18 (La. App. 2 Cir. 11/24/10); 55 So. 3d 856, 867.

<sup>174</sup> See *State v. Campbell*, 2008-1226, p. 10 (La. App. 5 Cir. 5/26/09) writ denied, 27 So. 3d 842 (La. 2010); 15 So. 3d 1076, 1082.

<sup>175</sup> See *State v. Campbell*, 2008-1226, p. 10 (La. App. 5 Cir. 5/26/09) writ denied, 27 So. 3d 842 (La. 2010); 15 So. 3d 1076, 1082.

## CHAPTER 3: APPEALING YOUR CONVICTION BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL

### A. INTRODUCTION

Many prisoners appeal their conviction by claiming that their lawyer did not do their job. This sort of claim is referred to as an “ineffective assistance of counsel” claim. Under the Sixth Amendment and the Fourteenth Amendment of the United States Constitution, you have a right to have a lawyer represent you during a criminal trial.<sup>1</sup> You also have this right under the Louisiana state constitution.<sup>2</sup> This means that if your lawyer does not do a proper job in representing you, you have the option of trying to change the results of your case by making an ineffective assistance of counsel claim.

This chapter explains the Louisiana standards for bringing ineffective assistance of counsel claims. It is important to know that the Louisiana standards are the same as the federal standards. Chapter 12 of the main *JLM* explains the federal standards for bringing an ineffective assistance of counsel claim. This chapter will use examples from Louisiana cases to help explain how to argue that your lawyer was “ineffective.”

There are three different ways to bring an ineffective assistance of counsel claim. First, you can claim that your lawyer did not meet basic professional standards, or that their representation you was far below what is expected from a lawyer. This is called an actual ineffective assistance of counsel claim. Second, you could argue that you have been denied counsel. This kind of claim is considered a constructive denial of counsel claim. In criminal cases, the Supreme Court has said that people who are not able to afford counsel have a fundamental right to be assigned one in order to ensure a fair trial.<sup>3</sup> Third, you can claim that your lawyer had a conflict of interest while representing you. Examples of potential conflicts of interest include: the lawyer may have a personal relationship with the opposing party or judge, have represented the opposing party before, or may even be currently representing the opposing party. Part B will explain the Louisiana standards for bringing each of these three types of ineffective assistance of counsel claims. Part C will explain the timing for when you should bring these claims, and part D will tell you how you can use ineffective assistance of counsel to get around issues with case procedure. Finally, Part E will give you an idea of some common ineffective assistance of counsel claims that others have brought in Louisiana.

### B. LOUISIANA STANDARDS FOR INEFFECTIVE ASSISTANCE OF COUNSEL

Always remember to bring your ineffective assistance of counsel claim as both a state and federal constitutional claim. This is important because otherwise you may not be able to bring up the issue in later proceedings. When you bring these claims, you should say that your lawyer’s performance denied you your “due process rights” under both the United States Constitution and the Louisiana state constitution.

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<sup>1</sup> The 6th Amendment of the U.S. Constitution gives you a federal right “to have the Assistance of Counsel.” U.S. CONST. amend. VI. The 14th Amendment requires all fifty states, including Louisiana, to make sure that you have a lawyer in a criminal trial, unless you do not want one. U.S. CONST. amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342–343, 83 S. Ct. 792, 795–796, 9 L. Ed. 2d 799, 804 (1963) (holding that the 6th Amendment right to counsel is a fundamental right essential to a fair trial, and holding that the 14th Amendment makes the right to counsel obligatory on the states). Those two amendments also require that your lawyer is effective in representing you. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984) (assistance is not considered effective if counsel’s errors were so serious as to deprive defendant of a fair trial).

<sup>2</sup> LA. CONST. art. 1, § 13. (“At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment.”). However, if the state appoints you a lawyer, you do not have a right to choose your lawyer. Both the U.S. and the Louisiana Supreme Court have also stated that there is no right to a meaningful relationship with your lawyer. *State v. Reeves*, 2006-2419, pp. 51–52 (La. 5/5/09); 11 So. 3d 1031, 1065–1066 (“The Supreme Court has rejected any claim that the Sixth Amendment guarantees a ‘meaningful attorney-client relationship’ between an accused and his counsel.”) (quoting *Morris v. Slappy*, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617, 75 L. Ed. 2d 610, 621 (1983)).

<sup>3</sup> *Gideon v. Wainwright*, 372 U.S. 335, 342–343, 83 S. Ct. 792, 795–796, 9 L. Ed. 2d 799, 804 (1963).

Under Louisiana law, you have the right to a lawyer both for your criminal trial as well as for your first appeal. In Louisiana, you have the right to appeal your conviction if your case was one that could have been tried by a jury.<sup>4</sup> According to the Louisiana Code of Criminal Procedure, you do not always get a jury trial for misdemeanor charges.<sup>5</sup> You can usually get a jury trial if you are charged with a misdemeanor with a possible fine for more than one thousand dollars or a possible prison sentence of more than six months.<sup>6</sup>

### 1. Actual Ineffective Assistance of Counsel Claim: The *Strickland* Test

The most common type of ineffective assistance of counsel claims is the claim that your lawyer did not meet professional standards. The test for this claim has two parts. You must show (1) that your lawyer's performance in your case was not good enough and (2) that there is a decent chance that your lawyer's performance changed the outcome of your trial.<sup>7</sup> This two-part test for actual ineffective assistance of counsel is called the *Strickland* test, named for the U.S. Supreme Court case that laid out this test. The Louisiana test for ineffective assistance of counsel claims is the same as the *Strickland* test.<sup>8</sup> This section will explain both parts of the *Strickland* test.

#### a. Deficient Performance

First, you will need to show that your lawyer did not meet professional standards. In order to figure out whether your lawyer did a bad job, courts will ask if your lawyer acted the way that most lawyers would have in a similar case.<sup>9</sup> In most cases, only serious acts or mistakes will count as ineffective. The courts will usually assume that your lawyer did a good job.<sup>10</sup> They will assume this because there are many different ways that a good lawyer could handle a case, and courts want to let lawyers try different and new strategies. As long as your lawyer's choices were part of his strategy for a case, a court will probably not find that your lawyer was ineffective.<sup>11</sup>

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<sup>4</sup> LA. CONST. art. 5, § 10. ("Except as otherwise provided by this constitution, a court of appeal has appellate jurisdiction of . . . (3) all criminal cases triable by a jury, except as provided in Section 5, Paragraph (D)(2) of this Article.").

<sup>5</sup> LA. CODE CRIM. PROC. ANN. art. 779(B) (2017) ("The defendant charged with any other misdemeanor shall be tried by the court without a jury.").

<sup>6</sup> LA. CODE CRIM. PROC. ANN. art. 779(A) (2017) ("A defendant charged with a misdemeanor in which the punishment, as set forth in the statute defining the offense, may be a fine in excess of one thousand dollars or imprisonment for more than six months shall be tried by a jury of six jurors, all of whom must concur to render a verdict.").

<sup>7</sup> *State v. Hampton*, 2000-0522, p. 1 (La. 3/22/02); 818 So. 2d 720, 731 (Knoll, J., dissenting) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

<sup>8</sup> *See, e.g., State v. Ford*, 2010-1151, p. 1 (La. 2/4/11); 57 So. 3d 297, 297 (Johnson, J., dissenting from denial of certiorari) (stating that the Louisiana Supreme Court had adopted the *Strickland* test in the *State v. Washington* decision).

<sup>9</sup> *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Berry*, 430 So. 2d 1005, 1007 (La. 1983) ("The United States Supreme Court recognizes defendants' right to a lawyer who is within the normal range of competence . . ."); *see also State v. Moore*, 575 So. 2d 928, 931 (La. App. 2 Cir. 1991) ("In determining whether counsel was ineffective, the relevant inquiry is whether counsel's representation fell below an objective standard of reasonableness and competency as informed by prevailing professional standards demanded for attorneys in criminal cases.").

<sup>10</sup> *State v. Stewart*, 2000-2960, p. 8 (La. 3/15/02); 815 So. 2d 14, 18 ("*Strickland* imposes on a defendant the difficult burden of overcoming a strong presumption that the challenged action of his trial counsel reflected sound trial strategy . . .").

<sup>11</sup> *State v. Brooks*, 94-2438, pp. 6-7 (La. 10/16/95); 661 So. 2d 1333, 1337 (finding that counsel's decision not to question any of the State's witnesses was part of the trial strategy and therefore was not ineffective); *State v. Skipper*, 2011-1346, p. 7 (La. App. 4 Cir. 10/10/12); 101 So. 3d 537, 542 ("If an alleged error falls 'within the ambit of trial strategy,' it does not establish 'ineffective assistance of counsel.'" (quoting *State v. Bienemy*, 483 So. 2d 1105, 1107 (La. Ct. App. 1986))); *State v. Parker*, 96-1852, p. 16 (La. App. 4 Cir. 6/18/97); 696 So. 2d 599, 607 (finding that counsel's decision not to give an opening statement was part of strategy to prevent the prosecution from figuring out the defense and therefore counsel's decision was not ineffective).

A court is not going to make its decision by looking back on what your lawyer should have done now that you know the outcome of the trial.<sup>12</sup> Instead, the court will try to determine what most other lawyers would say is what a capable lawyer would have done with your situation.<sup>13</sup> It is possible that a court can consider a lawyer effective even if he makes some mistakes. Courts do not expect that lawyers will always do a perfect job with all of their cases. In order to make a strong argument, you should not just say that your lawyer generally did a bad job or that your lawyer was too busy to spend enough time on your case.<sup>14</sup> You should, however, be as specific as possible about what exactly your lawyer did or did not do that was bad. You will not be able to win if you just make very broad statements that you do not think your lawyer was good enough.

#### b. Prejudice

The second part of the *Strickland* test is that you have to show prejudice from your lawyer's ineffectiveness. Prejudice means that there is a decent chance that your lawyer's performance changed the outcome of your trial. Even if you can show that your lawyer did not act like most lawyers in a similar situation would have acted, you still cannot win unless you also show that there is a decent chance your case outcome would have been different, based on what your lawyer did or did not do, so that a court thinks that you did not have a fair trial.<sup>15</sup>

If your lawyer did a bad job but your case would have come out the same way, then you cannot win an ineffective assistance of counsel claim.<sup>16</sup> It is not enough to simply show that your lawyer could have hypothetically had a bad effect on your case.<sup>17</sup> You need to show that there is a decent chance that your case would have had different results if your lawyer had done a good job.<sup>18</sup> Like with the first part of the *Strickland* test, you should be as specific as possible about the negative effects your lawyer had on your case.

A criminal trial has two different phases. There is usually a phase where the court is trying to determine whether a defendant is guilty or not-guilty, and there is a phase in which the court is deciding on what the punishment for a guilty defendant should be. The "guilt-innocence" phase is for figuring out whether you are guilty of the charges the prosecution has brought against you. If the court decides that you are guilty, then the penalty phase is for figuring out an appropriate sentence. You can bring a claim of ineffective assistance of counsel for either or both of these phases.<sup>19</sup> Louisiana courts will consider your

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<sup>12</sup> State v. Stewart, 08-1265, p. 11 (La. App. 5 Cir. 5/26/09); 15 So. 3d 276, 283 ("[H]indsight is not the proper perspective for judging the competence of counsel's trial decisions.") (citing State v. Brooks, 505 So. 2d 714, 724 (La. 1987)).

<sup>13</sup> State v. Pierre, 524 So. 2d 1289, 1291 (La. App. 3 Cir. 1988) ("To establish a claim of ineffective representation, the defendant must demonstrate that counsel did not meet the level of competency 'normally demanded' in criminal cases.") (quoting State *ex rel.* Graffagnino v. King, 436 So. 2d 559 (La. 1983)).

<sup>14</sup> State v. Broyard, 2000-2290, p. 12 (La. App. 4 Cir. 11/14/01); 802 So. 2d 845, 854 (stating that defendant's argument was not specific enough, where defendant had generally claimed that his trial counsel was ineffective because he had a caseload that was too high).

<sup>15</sup> State v. Matthis, 2007-0691, p. 7 (La. 11/2/07); 970 So. 2d 505, 509 ("[T]he standard for ineffective assistance of counsel . . . requires respondent to show not only that his trial attorney's performance fell below an objective standard of reasonableness under prevailing professional norms but also that counsel's inadequate performance prejudiced him to the extent that the trial was rendered unfair and the verdict suspect . . ."); State v. Brooks, 94-2438, p. 6 (La. 10/16/95); 661 So. 2d 1333, 1337 ("[The Strickland test] requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.").

<sup>16</sup> State v. Matthis, 2007-0691, p. 7 (La. 11/2/07); 970 So. 2d 505, 509.

<sup>17</sup> State v. Moody, 2000-0886, p. 6 (La. App. 1 Cir. 12/22/00); 779 So. 2d 4, 6 ("It is not enough for defendant to show that his counsel's errors or omissions had some conceivable effect on the outcome of the proceeding. Rather, he must show that, but for counsel's errors, a reasonable probability exists that the outcome of the trial would have been different.").

<sup>18</sup> Schwehm v. Jones, 2003-0109, p. 6 (La. App. 1 Cir. 2/23/04); 872 So. 2d 1140, 1144 ("The defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.") (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 691 (1984)).

<sup>19</sup> See, e.g., State v. Sanders, 93-0001, p. 25 (La. 11/30/94); 648 So. 2d 1272, 1291 ("When a defendant challenges the effectiveness of his counsel at the penalty phase, the court must determine whether there is a reasonable probability that, absent counsel's errors, the sentencer would have concluded that the balance of aggravating and mitigating

lawyer's performance when trying to decide whether to set aside a guilty plea.<sup>20</sup> You should think about these different phases when you are describing how your lawyer's work hurt your case.

The amount and type of evidence that you need to show that your lawyer hurt your case will be different depending on the specific case. For example, if your case went to trial, you will need to show that if it weren't for your lawyer, there is a decent chance that you could have had a different verdict. On the other hand, if you accepted a plea deal, you will probably focus more on trying to show that if it weren't for your lawyer, you would not have taken that plea and would have decided to go to trial instead.<sup>21</sup> If you are saying that your lawyer did not do an adequate job during the sentencing phase of your trial, you will have to show that if it weren't for your lawyer, there is a decent chance you would have gotten a different sentence.

## 2. Penalty Phase—Capital Punishment

Louisiana courts have paid special attention to situations when a lawyer who did not do a good job was part of the reason for someone to receive the death penalty.<sup>22</sup> If you are facing the possibility of the death penalty, your lawyer is supposed to work hard to represent you and to fight for your case.<sup>23</sup> If you claim that your lawyer was ineffective in a death penalty case, the higher court will probably tell your trial court to hold a hearing to gather evidence about whether or not your lawyer did a good enough job.<sup>24</sup> In order to figure out whether your lawyer met professional standards, a court will think about what the jury would have done if your lawyer had done an adequate job. In order to win, you will have to show that if it weren't for your lawyer, the jury probably would have decided that you should not get the death penalty.

In particular, your lawyer is supposed to look for any evidence that would make a jury less willing to give you the death penalty.<sup>25</sup> However, your lawyer could ultimately decide not to use this evidence as

factors did not warrant death.”); *State v. Berry*, 430 So. 2d 1005, 1010 (La. 1983) (“It is contended that attorney Blanche rendered ineffective assistance of counsel to defendant at trial of both guilt and penalty.”).

<sup>20</sup> In order for a guilty plea to be valid, you have to have voluntarily agreed to it. Sometimes a court will decide that your lawyer did such a bad job that you did not really voluntarily agree to your plea. *State v. Garza*, 623 So. 2d 1288, 1288 (La. 1993) (remanding the case and finding the plea involuntary because counsel did not explain that the circumstances of the case did not support the charge); *State v. Washington*, 491 So. 2d 1337, 1338 (La. 1986) (“We hold, therefore, that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.”).

<sup>21</sup> *State v. Calhoun*, 96-0786, pp. 10–11 (La. 5/20/97); 694 So. 2d 909, 914–915 (finding that counsel was ineffective because he filed a motion to be relieved as counsel and told the court that he was unprepared but still advised his client to take a plea); *State ex rel. Clement v. Whitley*, 94-0828, p. 1 (La. 9/3/96); 678 So. 2d 538, 538 (remanding to the district court for the lower court to determine whether counsel had misinformed defendant about the terms of a plea bargain and if so, whether misinforming constituted ineffective assistance); *State v. Beatty*, 391 So. 2d 828, 831 (La. 1980) (“When a defendant enters a counselled plea of guilty, this court will review the quality of counsel’s representation in deciding whether the plea should be set aside.”).

<sup>22</sup> *State v. Sanders*, 93-0001, p. 25 (La. 11/30/94); 648 So. 2d 1272, 1291 (“The role of an attorney at a capital sentencing proceeding resembles his role at trial. He must ensure that the adversarial testing process works to produce a just result . . . .”) (quoting *Burger v. Kemp*, 483 U.S. 776, 788–789, 107 S. Ct. 3114, 3122–3126, 97 L. Ed. 2d 638, 653 (1987)); *State v. Williams*, 480 So. 2d 721, 728 n.14 (La. 1985) (“Ineffective assistance of counsel in the penalty phase of capital cases is a recurring problem. In many cases . . . defense counsel, after vigorously contesting the guilt phase, has turned the case over to the jury for penalty determination with little additional evidence or argument . . . .”).

<sup>23</sup> *State v. Ford*, 2010-1151, p. 2 (La. 2/4/11); 57 So. 3d 297, 297 (Johnson, J., dissenting from denial of certiorari) (“A defendant at the penalty phase of a capital trial is entitled to the assistance of a reasonably competent attorney acting as a diligent, conscientious advocate for his life.”).

<sup>24</sup> *State v. Wille*, 559 So. 2d 1321, 1339 (La. 1990) (“[T]his court on several occasions in capital cases has pretermitted determination of the validity of a death sentence . . . and has remanded the case to the trial court . . . for an evidentiary hearing on the claim and a determination whether the evidence creates a reasonable doubt as to the death sentence.”); *State ex rel. Williams v. Butler*, 520 So. 2d 759, 759 (La. 1988) (staying execution and remanding to lower court for an evidentiary hearing).

<sup>25</sup> *State v. Sullivan*, 596 So. 2d 177, 190 (La. 1992), *rev’d on other grounds*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (“In evaluating a claim of ineffective assistance of counsel during the penalty phase of a capital case, we

part of his or her strategy for your case.<sup>26</sup> In addition, if you specifically asked your lawyer not to tell the jury or the court some evidence, then you cannot say that your lawyer was ineffective by not providing that evidence.<sup>27</sup> If your lawyer did not have a strategic reason for leaving out the evidence, a court will still ask whether your lawyer's mistake actually harmed you. A court will consider whether the chance that the jury would not have given you the death penalty is high enough so that the court cannot feel confident that the penalty phase of your trial was fair.<sup>28</sup>

Whether or not your case involves capital punishment, you will need to show that what your lawyer did or did not do hurt the outcome of your case. Remember that showing that there was some small chance of a different outcome is not enough. You need to show that there was a decent chance that the outcome would be different. Do not forget to be as specific as possible about how the results in your case would have been different if it weren't for your lawyer.

### 3. Constructive Denial of Counsel

In addition to actual ineffective assistance of counsel, in some situations, you can say that you had constructive denial of counsel. This claim is usually for a situation that was so bad that it was as if you did not have a lawyer at all. There are three types of situations in which you can bring a constructive denial of counsel claim: (1) if you actually did not have a lawyer during an important part of your criminal proceedings; (2) if your lawyer did little or nothing to challenge the prosecutor's case against you; and (3) if the circumstances of your trial prevented or would prevent your lawyer from doing an adequate job.<sup>29</sup> This test is an exception from the *Strickland* test because you do not need to show that your lawyer's acts or omissions harmed your case. If you successfully bring a constructive denial of counsel claim, a court may assume that you meet the second part of the *Strickland* test.<sup>30</sup> For example, if your lawyer is really unprepared for your case, a court cannot force you to go on with your case either unrepresented or with a lawyer who is not prepared.<sup>31</sup> In this kind of situation since your trial is still ongoing, you do not have to show that your lawyer hurt your case.

In general, this claim is harder to bring than an actual ineffective assistance of counsel claim.<sup>32</sup> Listed below, you will find some examples of constructive denial of counsel claims that have not worked either in Louisiana state courts or in the United States Court of Appeals for the Fifth Circuit:

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must first determine whether a reasonable investigation would have uncovered mitigating evidence.”) (citing *State ex rel. Busby v. Butler*, 538 So. 2d 164, 169 (La. 1988)).

<sup>26</sup> *State v. Sullivan*, 596 So. 2d 177, 190–191 (La. 1992), *rev'd on other grounds*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (“Where mitigating evidence is not presented to the jury because of counsel's tactical choice, a defendant must overcome the strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy.”) (citing *State ex rel. Busby v. Butler*, 538 So. 2d 164, 169 (La. 1988)).

<sup>27</sup> *State v. Bordelon*, 2007-0525, p. 36 (La. 10/16/09); 33 So. 3d 842, 865 (finding that counsel was not ineffective because “defendant had the capacity to make a knowing and intelligent waiver of his right to present mitigating evidence and that he did so explicitly during his colloquy with the trial judge at the outset of the sentencing phase”).

<sup>28</sup> *State v. Hamilton*, 92-2639, p. 10 (La. 7/1/97); 699 So. 2d 29, 34 (stating that because the lawyer failed to show the jury defendant's psychiatric history “the degree of likelihood that a jury would not have recommended a death sentence is sufficient to undermine confidence in the outcome of the penalty phase of the trial”).

<sup>29</sup> *United States v. Cronin*, 466 U.S. 648, 658–660, 104 S. Ct. 2039, 2046–2047, 80 L. Ed. 2d 657, 667–669 (1984).

<sup>30</sup> *United States v. Cronin*, 466 U.S. 648, 658–660, 104 S. Ct. 2039, 2046–2047, 80 L. Ed. 2d 657, 667–669 (1984); *State v. Sheppard*, 624 So. 2d 1209, 1209 (La. 1993) (per curiam) (remanding with instructions to the lower court to determine whether there was a constructive denial of counsel from which the court could presume prejudice).

<sup>31</sup> *State v. Knight*, 611 So. 2d 1381, 1383 (La. 1993) (finding constructive denial of counsel when the trial court had appointed a new counsel at the time of trial and proceeded without the former lawyer); *see also State v. Laugand*, 1999-1124, p. 1 (La. 3/17/00); 759 So. 2d 34, 35 (“[A] trial judge may not constructively deny the defendant his right to counsel by forcing him to trial represented by an attorney who refuses to participate in any manner in the proceedings because he believes he has not had time to prepare an adequate defense . . .”) (citing *State v. Brooks*, 452 So. 2d 149, 155–156 (La. 1984)).

<sup>32</sup> *State v. Richardson*, 2006-0250, p. 10 (La. App. 1 Cir. 11/3/06); 941 So. 2d 198 (unpublished) (“A constructive denial of counsel occurs in only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all.”); *McInerney v. Puckett*, 919 F.2d 350, 353 (5th Cir. 1990) (“[N]o doubt a *total* lack of attorney preparedness . . . might be tantamount to no counsel



- 1) Counsel failed to challenge possible racial bias in the jury selection;<sup>33</sup>
- 2) Counsel only casually prepared for trial;<sup>34</sup>
- 3) Counsel failed to investigate issues;<sup>35</sup>
- 4) Counsel failed to object even though the indictment did not match the jury charge;<sup>36</sup> or
- 5) Counsel did not communicate/touch base with client before trial.<sup>37</sup>

To sum up, constructive denial of counsel is a special exception to the *Strickland* test. Successful claims usually have to do with really unprepared lawyers or lawyers who do absolutely nothing during the trial. In most situations, courts will still use the normal *Strickland* test to figure out whether your lawyer did an adequate job.

#### 4. Conflicts of Interest

Another way that you can bring an ineffective assistance of counsel claim is to say that your lawyer had a conflict of interest (a relationship that threatens his ability to best represent you). Louisiana courts have said that effective counsel means that your lawyer cannot be in a position where he or she has responsibilities that conflict with their loyalty to you.<sup>38</sup> Your lawyer has a conflict of interest if he or she has a responsibility to another person and if that responsibility could cause you harm.<sup>39</sup> For example, your lawyer could also represent or have represented the person you are suing. The most important question is whether a conflict of interest would have stopped your lawyer from taking an action that could have helped you out in your case.<sup>40</sup>

If your lawyer represented more than one person in the same trial, it does not necessarily mean that he or she had a conflict of interest.<sup>41</sup> For example, if all of the defendants have the same or similar goals in the trial, then a lawyer can represent all of them without a conflict.<sup>42</sup> Louisiana courts have found that a conflict of interest existed when a lawyer had to cross-examine a witness who was or used to be a client.<sup>43</sup> They have also said that there could be a conflict of interest when a lawyer was facing criminal

and would call for a presumption of unreliability, but not every case of somewhat deficient preparedness rises to this level.”).

<sup>33</sup> *Harris v. Johnson*, 81 F.3d 535, 540 n.16 (5th Cir. 1996).

<sup>34</sup> *McInerney v. Puckett*, 919 F.2d 350, 352 (5th Cir. 1990) (stating that the lower court had erred by presuming prejudice rather than figuring out whether defendant had actually suffered harm).

<sup>35</sup> *Woodard v. Collins*, 898 F.2d 1027, 1029 (5th Cir. 1990) (finding that the normal *Strickland* test should apply when defendant claims that lawyer failed to investigate some issues).

<sup>36</sup> *Ricalday v. Procnier*, 736 F.2d 203, 207 n.6 (5th Cir. 1984) (finding that the lawyer’s performance was not so bad to meet the test for constructive denial of counsel).

<sup>37</sup> *State v. Ford*, 2009-0392, p. 5 (La. App. 4 Cir. 10/21/09); 24 So. 3d 249, 252–253 (“While trial counsel has a professional, ethical, and legal duty to confer with her client, her failure to do so prior to trial does not amount to a ‘constructive’ denial of counsel.” (footnote omitted) (citing *State v. Johnson*, 2004-0178 (La. App. 4 Cir. 12/8/04); 892 So. 2d 28).

<sup>38</sup> *State v. Kahey*, 436 So. 2d 475, 484 (La. 1983) (“An actual conflict of interest is established when the defendant proves that his attorney was placed in a situation inherently conducive to divided loyalties.”) (citing *Zuck v. Alabama*, 588 F.2d 436 (5th Cir. 1979)).

<sup>39</sup> *State v. Carter*, 2012-0614, p. 7 (La. 1/24/12); 84 So. 3d 499, 509 (“If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interest of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to the other client.”) (quoting *State v. Kahey*, 436 So. 2d 475, 485 (La. 1983)).

<sup>40</sup> *State v. Carter*, 2012-0614, p. 7 (La. 1/24/12); 84 So. 3d 499, 509–510 (“The inherent dilemma in conflict of interest situations stems from what counsel finds himself compelled to refrain from doing.”) (citing *Holloway v. Arkansas*, 435 U.S. 475, 490, 98 S. Ct. 1173, 1181, 55 L. Ed. 2d 426, 438 (1978)).

<sup>41</sup> *State v. Lobato*, 603 So. 2d 739, 749 (La. 1992) (“Multiple representation does not presumptively result in the ineffective assistance of counsel so as to violate constitutional guarantees unless it gives rise to a conflict of interest.”) (citing *State v. Kahey*, 436 So. 2d 475, 485 (La. 1983)).

<sup>42</sup> *See, e.g., State v. Smith*, 98-2078 (La. 10/29/99); 748 So. 2d 1139, 1142–1144 (finding no conflict of interest because all three defendants could assert a common defense that was consistent with witness testimony and with Louisiana law on second degree felony murder).

<sup>43</sup> *State v. Tensley*, 41,726, pp. 30–31 (La. App. 2 Cir. 4/4/07); 955 So. 2d 227, 245–246 (finding conflict of interest when defendant’s lawyer during early stages of the criminal proceedings switched sides and cross-examined defendant at

charges, especially if the charges were related to the defendant's situation.<sup>44</sup> You should remember though that what counts as a conflict of interest will be different depending on each person's situation.

It is important to note that it is not enough to just say that your lawyer could have had a conflict.<sup>45</sup> You will need to show that your lawyer actually had the conflict of interest.<sup>46</sup> You should try to be as specific as possible about your lawyer's conflict.<sup>47</sup> The standard for showing conflict of interest is different depending on when you bring up this issue. If you are able to show that your lawyer has a conflict before trial, you do not need to show that you would actually be harmed by this conflict.<sup>48</sup> When you bring up conflicts of interest before trial, the court must either appoint you a new lawyer or decide that the conflict is so unlikely that you do not actually need a new lawyer.<sup>49</sup> Unlike with a claim before trial, if you bring up any conflicts of interest after trial, then you must show that the conflict led to harm in your case.<sup>50</sup>

The government may try to say that you waived your right to a lawyer who does not have a conflict of interest. You are allowed to waive a conflict of interest, but only if a court tells you: (1) that a conflict exists; (2) any possible consequences from having a lawyer with a conflict of interest; and (3) that you have the right to get a new lawyer.<sup>51</sup> If the court did not tell you all three of these items, then you cannot have waived the conflict of interest.<sup>52</sup>

### C. TIMING: WHEN TO BRING AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

In most situations, courts will not hear ineffective assistance of counsel claims on direct appeal.<sup>53</sup> This is especially true if you are basing your claim on actions your lawyer did or did not do before your trial.<sup>54</sup> This is because normally there is not enough evidence from the trial record for a court to figure out whether or not your lawyer has done a good enough job. For example, if you are trying to say that your

trial). *But see* State v. Carter, 2012-0614, p. 9 (La. 1/24/12); 84 So. 3d 499 (finding no actual conflict of interest when co-counsel was the one who cross-examined counsel's former witness).

<sup>44</sup> State v. Carter, 2012-0614, pp. 9–10 (La. 1/24/12); 84 So. 3d 499, 510–511 (stating that there could be a conflict of interest if the same district attorney's office investigating the defendant was also investigating counsel).

<sup>45</sup> State v. Carter, 2012-0614, p. 7 (La. 1/24/12); 84 So. 3d 499, 509–510 (“The burden of proving an ‘actual conflict of interest,’ rather than a ‘mere possibility of conflict’ rests upon the defendant.”) (quoting State v. Franklin, 400 So. 2d 616, 620 (La. 1981)).

<sup>46</sup> State v. Carter, 2012-0614, p. 7 (La. 1/24/12); 84 So. 3d 499, 509–510 (“The burden of proving an ‘actual conflict of interest,’ rather than a ‘mere possibility of conflict’ rests upon the defendant.”) (quoting State v. Franklin, 400 So. 2d 616, 620 (La. 1981)).

<sup>47</sup> State v. Carter, 2012-0614, p. 7 (La. 1/24/12); 84 So. 3d 499, 509 (“To show an actual conflict, a defendant must prove, through specific instances in the record, that his attorney was placed in a situation inherently conducive to divided loyalties.” (citing State v. Tart, 93-0772 (La. 2/9/96); 672 So. 2d 116, 125)).

<sup>48</sup> State v. Carter 2012-0614, p. 6 (La. 1/24/12); 84 So. 3d 499, 509 (“[I]f an actual conflict exists, there is no need for a defendant to prove that he was also prejudiced thereby.”) (quoting State v. Franklin, 400 So. 2d 616, 620 (La. 1981)).

<sup>49</sup> State v. Carmouche, 508 So. 2d 792, 805 (La. 1987).

<sup>50</sup> State v. Tart, 93-0772, p. 20 (La. 2/9/96); 672 So. 2d 116, 125 (“If an objection to an attorney conflict of interest is not raised until after trial, the defendant must show he was actually prejudiced.”); State v. Waters, 2002-0356, p. 8 (La. 03/12/01); 780 So. 2d 1053, 1058 (remanding case to district court for an evidentiary hearing on ineffectiveness of counsel, where counsel represented defendant and the police department that arrested defendant).

<sup>51</sup> State v. Cisco, 2001-2732, p. 22 (La. 12/3/03); 861 So. 2d 118, 133.

<sup>52</sup> *See, e.g.,* State v. Olivieri, 10-1064, p. 6 (La. App. 5 Cir. 9/13/11); 74 So. 3d 1191, 1194 (finding that defendant's waiver of his right to conflict-free counsel was invalid because at the time of waiver he did not fully know the possible consequences of his lawyer representing a co-defendant and he was not informed of his right to other counsel).

<sup>53</sup> *See, e.g.,* State v. Watson, 2000-1580, p. 4 (La. 5/14/02); 817 So. 2d 81, 84 (finding that ineffective assistance claim was more appropriate for post-conviction relief, partly due to the limited amount of evidence introduced at trial); State v. Mitchell, 94-2078, p. 6 (La. 5/21/96); 674 So. 2d 250, 255 (finding that ineffective assistance claim was more appropriate for post-conviction relief, where defendant alleged counsel did not explore defendant's intellectual disability and did not try to suppress defendant's confession); State v. Martin, 607 So. 2d 775, 788 (La. App. 1 Cir. 1992) (finding that defendant's claim was inappropriate for direct appeal because without an evidentiary hearing, it was hard to know whether filing pre-trial motions or further investigation was necessary).

<sup>54</sup> State v. Smith, 98-2078 (La. 10/29/99); 748 So. 2d 1139, 1142 (per curiam) (stating that the record before the court could not establish whether counsel discussed potential conflicts of interest with the defendants or whether counsel's preparations for trial could have had some negative effects for joint representation of the defendants).

lawyer did not provide important evidence during the trial, then the trial records will not contain any record of that evidence. The court will need to have a separate hearing in order to bring out that evidence.

If you think there was enough evidence during your trial to show that your lawyer did not do a good job and that as a result your case was hurt, then you can bring this kind of claim on direct appeal.<sup>55</sup> For instance, constructive denial of counsel claims might be the type of claim where you would have enough evidence from the trial to bring the claim on direct appeal. You can also choose to bring your claim before trial if you think there is already enough evidence that your lawyer is not doing enough.<sup>56</sup> A lot of times conflict of interest claims can come up before the trial starts.<sup>57</sup> Otherwise, you should bring the claim either in a state application for post-conviction relief or in a writ for state or federal habeas corpus to the trial court.<sup>58</sup>

After you file an application for post-conviction relief or a writ of habeas corpus, a court will sometimes order that you have a hearing in order to bring out evidence about what your lawyer did and did not do for your case.<sup>59</sup> The good part about this type of hearing is that, unlike with direct appeal, you will be able to show evidence that was not part of the trial.

Even though most of the time courts will say that you should bring your claim through post-conviction relief or habeas corpus, you should know that there is an important exception related to sentencing. Most criminal trials have both a guilt phase and a penalty phase. The penalty phase is sometimes called the sentencing phase. You cannot bring an ineffective assistance of counsel claim for the penalty or sentencing phase in an application for post-conviction relief.<sup>60</sup> If you are trying to say that your lawyer did a bad job with the penalty or sentencing phase, you need to bring up that claim during direct appeal. Since you do not have the option of bringing this claim in a post-conviction proceeding, a court may be willing to address your claim that your lawyer was ineffective during sentencing.<sup>61</sup>

### 1. *Peart* Motions

Most of the time you should bring an ineffective assistance of counsel claim after conviction. But you can bring a special type of claim before your trial if you think your lawyer does not have the time or resources to do a good job with your case.<sup>62</sup> You do this by making what is called a *Peart* motion. The

<sup>55</sup> See, e.g., *State v. Brumfield*, 96-2667, p. 14 (La. 10/20/98); 737 So. 2d 660, 668-669 (“[W]hen the record contains evidence sufficient to decide the issue [of ineffective assistance of counsel], the appellate court may consider the issue . . .”) (citing *State v. Ratcliff*, 416 So. 2d 528 (La. 1982)).

<sup>56</sup> *State v. Peart*, 621 So. 2d 780, 787 (La. 1993) (“If the trial court has sufficient information before trial . . . treating ineffective assistance claims before trial where possible will further the interests of judicial economy.”).

<sup>57</sup> *State v. Peart*, 621 So. 2d 780, 787 (La. 1993) (“For example, ineffective assistance of counsel claims based on allegations that the attorney is faced with a conflict of interest are routinely brought to the attention of the trial court and considered before trial.”) (citing *State v. McNeal*, 594 So. 2d 876 (La. 1992)).

<sup>58</sup> *State v. Winfrey*, 359 So. 2d 73, 76 (La. 1978) (“The proper procedural vehicle for an allegation of ineffective assistance of counsel is by a writ of habeas corpus in the district court.”); *State v. Mouton*, 327 So. 2d 413, 416 (La. 1976) (“Where it appears that counsel has failed in his professional duty toward a defendant, our system affords a defendant relief through a writ of habeas corpus alleging incompetent or ineffective counsel, in effect the deprivation of the right to the assistance of counsel.”) (quoting *State v. Marcell*, 320 So. 2d 195, 198 (La. 1975)); *State v. Leblanc*, 2010-1484, p. 23 (La. App. 4 Cir. 9/30/11); 76 So. 3d 572, 586-587 (finding that the record was inadequate to address whether counsel’s failure to investigate or to consult with defendant was ineffective).

<sup>59</sup> See, e.g., *State v. Berry*, 430 So. 2d 1005, 1007 (La. 1983) (explaining that upon defendant filing an application for a writ of habeas corpus, the judge ordered an evidentiary hearing). An “application for post conviction relief means a petition filed by a person in custody after sentence following conviction for the commission of an offense seeking to have the conviction and sentence set aside.” LA. CODE CRIM. PROC. ANN. art. 924 (2017).

<sup>60</sup> LA. CODE CRIM. PROC. ANN. art. 930.3 (2017); *State v. Thomas*, 2008-2912, p. 1 (La. 10/16/09); 19 So. 3d 466, 466 (“[R]elator’s claims that the court imposed an excessive sentence and that he received ineffective assistance of counsel at sentencing are not cognizable on collateral review . . .”).

<sup>61</sup> See, e.g., *State v. Jones*, 46,712, p. 4 (La. App. 2 Cir. 11/2/11); 80 So. 3d 500, 502 (reviewing defendant’s claims of ineffectiveness during the sentencing phase because the claim would not be cognizable on collateral review).

<sup>62</sup> *State v. Reeves*, 2006-2419, p. 66 (La. 5/5/09); 11 So. 3d 1031, 1074 (“[A] claim of ineffectiveness may be raised pretrial, based on counsel’s ability to provide constitutionally effective counsel due to resources available and caseload concerns.”).

Louisiana Supreme Court has said that an effective lawyer has to have the time and the skills needed to represent you well.<sup>63</sup> For example, a court will not think your lawyer is ineffective because he or she represented many defendants. But, you can still win if you can show that your lawyer had too much work and he or she did not have the time or resources to do a good job on your case.<sup>64</sup> If you make a *Peart* motion, you have to give specific evidence. This evidence must show that your lawyer has too many cases and cannot pay enough attention to your case.<sup>65</sup> Just saying that your lawyer has a lot of clients is not enough for a successful *Peart* motion.

## 2. Collateral Proceedings and Appeals

Normally, you cannot bring an ineffective assistance of counsel claim out of collateral proceedings.<sup>66</sup> A collateral proceeding is a way of fighting your conviction. Collateral proceedings are based on reasons that were not available when your trial happened. Under the United States Constitution and the Louisiana State Constitution, you do not have a right to a lawyer for post-conviction proceedings. You only have a right to counsel for pre-trial and trial procedures.<sup>67</sup> You also have a right to a lawyer for your first appeal to review your conviction and sentence. But you do not have the same rights for any steps after that appeal.<sup>68</sup> This means that if your lawyer did not do a good enough job with any proceedings after your first appeal, you might not be able to challenge the outcome of those proceedings with an ineffective assistance of counsel claim.

### D. HOW YOU CAN USE INEFFECTIVE ASSISTANCE OF COUNSEL TO ADDRESS UNPRESERVED CLAIMS AND PROCEDURALLY DEFAULTED CLAIMS

You can use ineffective assistance of counsel claims to bring up issues on appeal that you normally cannot bring up. Ineffective assistance of counsel claims help with two common problems: 1) unpreserved claims and 2) procedural defaults. Preservation is the idea that you have to first bring up an issue at trial if you want to bring it up in an appeal.<sup>69</sup> So, if your lawyer did not file the correct motions, you might not be able to bring up certain topics. Chapters 9, 11, and 12 of the main *JLM* explain other ways that you can attack your conviction. These chapters also explain the idea of preservation. If you did not bring up an issue because of your lawyer, then a court will let you bring up the problem on appeal. Courts do this because it was your lawyer's fault for not bringing up the issue at trial. You should still have the chance to bring up the issue.

Procedural default is a lot like preservation. Procedural default happens when you cannot bring your claim before an appellate court because you or your lawyer did not follow state appeals procedures. Just like with preservation, you can use ineffective assistance of counsel claims to get around a procedural default problem. You can do this by arguing that your lawyer was ineffective because he or she did not follow a procedural rule, like filing a motion. However, you will have to show that your lawyer's failure to

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<sup>63</sup> State v. Peart, 621 So. 2d 780, 789 (La. 1993) ("We take reasonably effective assistance of counsel to mean that the lawyer not only possesses adequate skill and knowledge, but also that he has the time and resources to apply his skill and knowledge to the task of defending each of his individual clients.").

<sup>64</sup> State v. Peart, 621 So. 2d 780, 789 (La. 1993).

<sup>65</sup> State v. Lee, 2005-2098, p. 42 (La. 1/16/08); 976 So. 2d 109, 138 (finding that there was no evidence in the record to support defendant's claim that counsel's workload was too heavy); State v. Broyard, 2000-2290, p. 12 (La. App. 4 Cir. 11/14/01); 802 So. 2d 845, 854 (distinguishing defendant's claim from *Peart* because the claim was a general allegation).

<sup>66</sup> State v. Cotton, 2009-2397, p. 2 (La. 10/15/10); 45 So. 3d 1030, 1031 (per curiam) ("[R]espondent's claim that he received ineffective assistance of counsel at his habitual offender adjudication is not cognizable on collateral review so long as the sentenced imposed by the court falls within the range of the sentencing statutes.").

<sup>67</sup> State v. Johnson, 95-711, p. 4 (La. App. 3 Cir. 12/6/95); 664 So. 2d 766, 769 (citation omitted).

<sup>68</sup> Sometimes this first appeal is called "first-tier review." See, e.g., State v. Castillo 2009-1358, p. 9 (La. 1/28/11); 57 So. 3d 1012, 1017.

<sup>69</sup> "A defendant who does not file a motion to suppress an identification, and who fails to contemporaneously object to the admission of the identification testimony at trial, fails to preserve the issue of its admissibility as an error on appeal. Normally, defendant would be precluded from asserting these errors . . ." State v. Johnson, 95-711, pp. 3-4 (La. App. 3 Cir. 12/6/95); 664 So. 2d 766, 769.

follow that rule met both parts of the *Strickland* test.<sup>70</sup> If you succeed, then you can continue with your claim even though you did not follow the procedural rule.

### E. COMMON INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

In general, courts will not find that your lawyer did a bad job if the decisions that he or she made were part of their strategy for your case.<sup>71</sup> This is true even if their strategy ended up failing.<sup>72</sup> The following are some examples of ineffective assistance of counsel claims, some of which have been successful and some of which have failed. There are many possible acts or omissions (failure to act) that a court may consider ineffective. But remember that ineffective assistance depends on the facts of each person's circumstance. Even if one of these claims worked for somebody else, that does not guarantee that a court will decide that your case meets the test for ineffective assistance of counsel. These examples will just give you an idea of the arguments other people have made in the past.

- 1) Counsel failed to call or cross-examine witnesses.<sup>73</sup>
- 2) Counsel failed to investigate mitigating evidence.<sup>74</sup>
- 3) Counsel did not file any pre-trial motions.<sup>75</sup>
- 4) Counsel failed to give an opening statement.<sup>76</sup>
- 5) Counsel failed to give a satisfactory closing argument.<sup>77</sup>

<sup>70</sup> See, e.g., *State v. Crowell*, 99-2238, pp. 8–12 (La. App. 4 Cir. 11/21/00); 773 So. 2d 871, 878–880 (finding that even though counsel had failed to file motions to quash the multiple bill and to reconsider sentence, defendant did not provide evidence that the sentence was unconstitutionally excessive, so defendant had not met second part of the *Strickland* test).

<sup>71</sup> *State v. Brooks*, 94-2438, pp. 6–7 (La. 10/16/95); 661 So. 2d 1333, 1337 (finding that counsel's decision not to question any of the State's witnesses was part of the trial strategy and therefore was not ineffective); *State v. Skipper*, 2011-1346, p. 7 (La. App. 4 Cir. 10/10/12); 101 So. 3d 537, 542 ("If an alleged error falls 'within the ambit of trial strategy,' it does not establish 'ineffective assistance of counsel.'") (quoting *State v. Bienemy*, 483 So. 2d 1105, 1007 (La. Ct. App. 1986)); *State v. Parker*, 96-1852, p. 16 (La. App. 4 Cir. 6/18/97); 696 So. 2d 599, 607 (finding that counsel's decision not to give an opening statement was part of strategy to prevent the prosecution from figuring out the defense and that therefore counsel's decision was not ineffective); *State v. Woodard*, 2008-0606, pp. 12–14 (La. 5/5/09); 9 So. 3d 112, 119–120 (finding that counsel could reasonably decide not to call witnesses when their testimony might draw attention to evidence that could weigh against the defendant).

<sup>72</sup> *State v. Woodard*, 2008-0606, p. 13 (La. 5/5/09); 9 So. 3d 112, 120 ("That a particular strategy fails does not mean that it was professionally unreasonable.") (citing *State v. Felde*, 422 So. 2d 370, 393 (La. 1982)).

<sup>73</sup> *State v. Brooks*, 505 So. 2d 714, 723–724 (La. 1987) (finding that counsel's decision not to ask any of the state witnesses questions was not ineffective because it was part of trial strategy); *State v. Ratcliff*, 416 So. 2d 528, 530 (La. 1982) (finding that counsel's decision not to bring out witnesses that could bring out victim's violent past was not ineffective).

<sup>74</sup> *State v. Sparks*, 1988-0017, p. 65 (La. 5/11/11); 68 So. 3d 435, 484 (finding that while counsel does not have to present mitigating evidence, failure to investigate such evidence is ineffective (quoting *State ex rel. Busby v. Butler*, 538 So. 2d 164, 171 (La. 1988))); *State v. Brooks*, 94-2438, pp. 6–11 (La. 10/16/95); 661 So. 2d 1333, 1338–1339 (concluding that lawyer was ineffective for taking no steps to investigate defendant's mental health history and the possibility that defendant was emotionally controlled by another individual).

<sup>75</sup> *State v. Seiss*, 428 So. 2d 444, 447 (La. 1983) ("[C]ounsel for defense is not required to make motions and objections when they are not necessary, and the defendant must show specific prejudice in order to claim that the failure to make such motions resulted in ineffective assistance of counsel."); *State v. Garland*, 482 So. 2d 133, 135 (La. Ct. App. 1986) (finding that defendant had not met his burden when he alleged counsel failed to file pre-trial motions but did not explain what effect those motions could have had on his case) (citing *State ex rel. Fields v. Maggio*, 368 So. 2d 1016 (La. 1979)).

<sup>76</sup> *State v. Sparks*, 1988-0017, p. 62 (La. 5/11/11); 68 So. 3d 435, 482 ("Although we have never held that the failure to give an opening statement is in and of itself ineffective assistance of counsel, the failure to make an opening statement is a factor this Court considers in deciding whether counsel's performance is deficient."); *State v. Seiss*, 428 So. 2d 444, 447–448 (La. 1983).

<sup>77</sup> *State v. Stewart*, 2000-2960, pp. 7–10 (La. 3/15/02); 815 So. 2d 14, 18–19 (finding that counsel's performance was not bad enough to count as ineffective even though he gave a very minimal closing statement); *State v. Messiah*, 538 So. 2d 175, 187–188 (La. 1988) (finding that a short closing argument was not enough to conclude that counsel's performance was ineffective); *State v. Myles*, 389 So. 2d 12, 31 (La. 1979) (finding that counsel was ineffective for giving a closing statement that was "little more than a mechanical submission of the defendant's fate to the decision-making process with no attempt to influence it").

- 6) Counsel failed to object to an error by the court or the prosecutor.<sup>78</sup>
- 7) Counsel failed to thoroughly explore a potential juror's thoughts on the death penalty.<sup>79</sup>
- 8) Counsel failed to raise an insanity defense.<sup>80</sup>
- 9) Counsel failed to prepare adequately for trial.<sup>81</sup>
- 10) Counsel stated that he or she lacked preparation for part of the trial.<sup>82</sup>
- 11) Counsel failed to discover key evidence.<sup>83</sup>
- 12) Counsel failed to keep client reasonably informed.<sup>84</sup>
- 13) Counsel failed to advise client of the right to a jury trial.<sup>85</sup>
- 14) Counsel failed to advise client of possible immigration consequences.<sup>86</sup>

## F. CONCLUSION

A claim of ineffective assistance of counsel can be a useful tool if you did not have an adequate lawyer either at trial or on direct appeal. It is also a way for you to get around procedural problems. If you have access to the main *JLM* and the rest of the Louisiana supplement, try to read all of the chapters related to ineffective assistance of counsel so you can get a complete picture of how to bring these claims. Remember that courts will look at these types of claims on a case-by-case basis and so it is really important to provide as much specific detail as possible about why exactly your lawyer did not do an adequate job and why your lawyer's performance hurt you.

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<sup>78</sup> State v. Bradley, 2008-0195, pp. 9–13 (La. App. 4 Cir. 10/1/08); 995 So. 2d 1230, 1237–1239 (finding that counsel was not ineffective for failing to object to jury instructions that could have been intended to break a deadlocked jury); State v. Hongo, 96-2060, pp. 5–6 (La. 12/02/97); 706 So. 2d 419, 422 (concluding that while counsel's performance was inadequate for failing to object to erroneous jury instructions, counsel did not prejudice defendant and was therefore not ineffective); State v. Winding, 2000-0364, pp. 3–5 (La. App. 4 Cir. 4/11/01); 787 So. 2d 385, 388–389 (finding that counsel was not ineffective by failing to object to the fact that defendant was wearing recognizable prison garb in front of the jury); State v. Williams, 92-2080, p. 6 (La. App. 4 Cir. 12/15/94); 647 So. 2d 1244, 1248 (finding that although counsel failed to object to the admission of evidence, claim of ineffective assistance failed because defendant did not show prejudice).

<sup>79</sup> State v. Smith, 98-1417 (La. 6/29/01); 793 So. 2d 1199 (unpublished) ("Moreover, this Court has held that counsel's failure to traverse a venire person expressing opposition to the death penalty does not constitute ineffective assistance.") (citing State v. Prejean, 379 So. 2d 240, 242–243 (La. 1979)).

<sup>80</sup> State v. Wolfe, 630 So. 2d 872, 882 (La. App. 4 Cir. 1993) (finding that counsel was not ineffective for not raising an insanity defense because such a defense would have been fraudulent); *see also* State v. Roman, 2000-1705, pp. 6–7 (La. 12/7/01); 802 So. 2d 1281, 1285 (finding failure to raise insanity defense did not constitute ineffective assistance of counsel where counsel raised another viable defense); *cf.* State v. Sullivan, 596 So. 2d 177, 190–192 (La. 1992) (finding that failure to investigate mental illness was ineffective assistance of counsel, which prejudiced defendant during penalty phase), *rev'd on other grounds*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

<sup>81</sup> State v. Stewart, 2000-2960, pp. 9–10 (La. 3/15/02); 815 So. 2d 14, 19 (acknowledging that a counsel with better preparation might have employed different tactics, but refusing to find that the deficiency rose to the level of ineffective counsel).

<sup>82</sup> State v. Sanders, 93-0001, p. 26–28 (La. 11/30/94); 648 So. 2d 1272, 1291–1292 (finding ineffectiveness when counsel had said he was unprepared for penalty phase and made several errors, including making ineffective opening statements and presenting very unprepared witnesses).

<sup>83</sup> State *ex rel.* Guise v. State, 2000-2185, p. 1 (La. 10/15/02); 828 So. 2d 557, 557–558 (remanding to lower court to determine whether failure to discover evidence of an agreement between the state and co-defendants amounted to ineffective assistance).

<sup>84</sup> In re Frank, 2006-0727, p. 37 (La. 10/17/06); 942 So. 2d 1050, 1053–1054 (finding that disciplinary action was warranted where counsel gave ineffective assistance by failing to keep client reasonably informed and to pursue client's claims).

<sup>85</sup> State v. Washington, 491 So. 2d 1337, 1339 (La. 1986) ("Counsel was probably also ineffective because of his failure to advise his client of his right to a jury trial.").

<sup>86</sup> Padilla v. Kentucky, 559 U.S. 356, 373–374, 130 S. Ct. 1473, 1486, 176 L. Ed. 2d 284, 299 (2010) (holding that an attorney has an affirmative duty to correctly advise a client of the possible deportation consequences of a guilty plea and that failure to do so falls below *Strickland's* "objective standard of reasonableness" test).

## CHAPTER 4: USING POST-CONVICTION DNA TESTING TO ATTACK YOUR CONVICTION OR SENTENCE\*

### A. INTRODUCTION

The purpose of this chapter is to explain how to ask a court to do DNA testing after you are convicted in order to prove your innocence. To begin this process, you will have to file a motion for post-conviction relief. This Chapter will walk you through how to write this motion and explain how the court may respond.

Over 300 individuals in the United States have been exonerated (found innocent) by post-conviction DNA testing to date.<sup>1</sup> For example, on September 28, 2012, a man named Damon Thibodeaux was exonerated by DNA testing after having been sentenced to death and spending 15 years in prison for a New Orleans-area murder.<sup>2</sup> DNA is uniquely capable of proving innocence in crimes where biological material (anything that comes from the human body) was left by the perpetrator (the person who committed the crime).<sup>3</sup> However, many people in prison were convicted before DNA testing was possible, or before it was considered reliable, and they were not able to present evidence at their trial that might have helped prove their innocence. There are organizations in Louisiana that help prisoners recover DNA evidence and secure DNA testing. Because applying for DNA testing is very complicated, the *JLM* strongly recommends that you contact one of these organizations rather than proceeding on your own (“*pro se*”) if possible.

In the past, methods of testing evidence found at crime scenes were crude (basic), and convictions based on crime scene evidence were often inaccurate. Modern DNA testing is much more accurate than older methods. If you believe there might have been biological evidence collected from the scene of the crime you were convicted of, and if you think DNA tests of the evidence would prove your innocence, you may be able to have the evidence tested or re-tested for DNA. Biological evidence means anything that comes from or has been in contact with a human body, such as blood, semen, hair, saliva, sweat, skin cells, fingernail scrapings, and clothing or weapons. Filing a motion for DNA testing is governed by Article 926.1 of the Louisiana Code of Criminal Procedure. When making your motion, you will have to follow the requirements of Article 926.1 closely.

Part B of this Chapter tells you how to file your motion for DNA testing. Part C describes what will happen after you file your motion. Part D discusses the option to appeal if the court denies your motion. Part E tells you what will happen if the court grants your motion. Part F discusses how you can go about contacting legal organizations that might be able to help you with filing a motion for DNA testing. Lastly, Appendix A includes the contact information for these legal organizations.

### B. HOW TO FILE A MOTION

#### 1. What to Include in Your Motion

Before filing a motion for a new trial based on newly discovered evidence (evidence that was not available at the time of your conviction), you need to file a motion to ask for DNA testing. Filing a motion for DNA testing can be complicated, so you should try to get a lawyer to help you with it if you can.<sup>4</sup> If you write a motion for DNA testing on your own, be very careful to include everything required. A court can deny your motion if it is missing any of the parts described below.

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<sup>1</sup> Exonerate the Innocent, *available at* <https://www.innocenceproject.org/exonerate/> (last visited Sept. 7, 2017).

<sup>2</sup> Damon Thibodeaux, *available at* <https://www.innocenceproject.org/cases/damon-thibodeaux/> (last visited Sept. 7, 2017).

<sup>3</sup> DNA (which stands for “deoxyribonucleic acid”) is a substance contained in every human cell. Each strand of DNA is encoded with information about the specific physical characteristics of the individual from whom it comes. What Is the Science Behind Forensic DNA Testing?, *available at* <http://www.innocenceproject.org/faqs/what-is-the-science-behind-forensic-dna-testing> (last visited Mar. 17, 2016). For more background information on DNA, *see* Genetics Home Reference, What is DNA?, *available at* <https://ghr.nlm.nih.gov/handbook/basics/dna> (last visited Mar. 14, 2016).

<sup>4</sup> Refer to Appendix A for a list of organizations that can help you.

You can obtain an application form from your correctional institution or from the district court clerk's offices.<sup>5</sup> The application form follows a "fill in the blank" format.<sup>6</sup> You should file your application with the *district* court where your conviction occurred, even if your actual conviction occurred in city court.<sup>7</sup> You should also include a copy of the judgment of your conviction and sentence with your application.<sup>8</sup> Finally, you should mail a copy of your application to the Office of Adult Services within the Department of Public Safety & Corrections,<sup>9</sup> at the following mailing address:<sup>10</sup>

Attn: Office of Adult Services  
P.O. Box 94304  
Baton Rouge, LA 70804-9304  
Phone: (225) 342-9711  
Fax: (225) 342-3349

All motions for post-conviction relief (including DNA testing) under Article 926 must include the following background information:<sup>11</sup>

- 1) The name of the person in custody (you) and the place of custody if known, or if not known, a statement to that effect;
- 2) The name of the custodian (Warden, Superintendent, Jailer, or authorized person having custody of you), if known, or if not known, a designation or description of him as far as possible;
- 3) A statement of the grounds upon which relief is sought, specifying with reasonable particularity the factual basis for such relief;<sup>12</sup>
- 4) A statement of all prior applications for writs of habeas corpus or for post-conviction relief filed by or on behalf of the person in custody in connection with his present custody; and
- 5) All errors known or discoverable by the exercise of due diligence (reasonable care).

Article 926.1 includes four additional requirements that must be included in a motion for DNA testing. When writing your motion, you should go through each requirement separately and show how the facts of your case meet each one. By being as clear as possible about a) the pieces of evidence you want tested, b) why you are seeking post-conviction DNA testing, and c) how you meet all the requirements of your state's statute, your motion will have a better chance of succeeding.

A motion for DNA testing under Article 926.1 must include the following four requirements:<sup>13</sup>

- 1) A factual explanation of why there is an articulable doubt (uncertainty that is able to be expressed clearly), based on competent evidence (evidence which tends to prove the matter in dispute) whether or not introduced at trial, as to the guilt of the petitioner in that DNA testing will resolve the doubt and establish the innocence of the petitioner;
- 2) The factual circumstances establishing the timeliness of the application;
- 3) The identification of the particular evidence for which DNA testing is sought;

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<sup>5</sup> For the address of your district court, refer to the following addresses: For Western District of Louisiana court offices, refer to <http://www.lawd.uscourts.gov/clerks-office/> (last visited Sept. 8, 2017); for Middle District of Louisiana court offices, refer to <http://www.lamd.uscourts.gov/> (last visited Sept. 8, 2017); for Eastern District of Louisiana court offices, refer to <http://www.laed.uscourts.gov/content/accessing-court> (last visited Sept. 8, 2017). The law governing this procedure is LA. CODE CRIM. PROC. ANN. arts. 925–926 (2017).

<sup>6</sup> LA. CODE CRIM. PROC. ANN. art. 926 (2017).

<sup>7</sup> LA. CODE CRIM. PROC. ANN. art. 926(A) (2017); La. Supreme Court Rules, Appendix A, Uniform Application for Post-Conviction Relief, *available at* <http://www.lasc.org/rules/supreme/appA.pdf> (last visited Mar. 17, 2016).

<sup>8</sup> LA. CODE CRIM. PROC. ANN. art. 926(A) (2017). If you ask for a copy of your judgment and do not receive it, you should make a note in your application that a copy of the judgment has been demanded and refused.

<sup>9</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(J) (2017).

<sup>10</sup> Department of Corrections, *available at* <http://doc.la.gov/pages/contact-us/headquarters/> (last visited Mar. 17, 2016).

<sup>11</sup> LA. CODE CRIM. PROC. ANN. art. 926(B) (2017). Article 926.1 is applicable until August 31, 2019. "On or after August 31, 2019, a petitioner may request DNA testing under the rules for filing an application for post-conviction relief as provided in Article 930.4 or 930.8." LA. CODE CRIM. PROC. ANN. art. 926.1 (2017).

<sup>12</sup> You will want to state that you are seeking relief based in accordance with the ground found in Article 930.3(7). That is, the results of DNA testing performed pursuant to an application granted under Article 926.1 will prove by clear and convincing evidence that I am factually innocent of the crime for which I was convicted.

<sup>13</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(B) (2017).



- 4) That the applicant is factually innocent of the crime for which he was convicted, in the form of an affidavit signed by the petitioner under penalty of perjury (law prohibiting lying under oath).

The following subsections will explain each of these four requirements of the motion in greater detail.

a. Explaining how DNA testing will establish your innocence

The first thing you must do when writing your motion is to tell the court why there is some doubt that you committed the crime and how DNA testing will help to establish your innocence. You cannot just say that “there is evidence currently available for DNA testing but the testing was not available or was not done at the time of the conviction;” you must explain *what* that evidence is and *why* it would prove your innocence.<sup>14</sup>

Relief will only be granted if the DNA testing proves by *clear and convincing evidence* that you are factually innocent of the crime for which you were convicted.<sup>15</sup> This does not mean that the court must be certain that the evidence will prove you are innocent, but it does impose a significant burden on you. A court can legally deny your request for testing if it believes that your conviction would be justifiable regardless of what a DNA test might show.<sup>16</sup>

In your motion, you should ask the court to take *judicial notice* of the trial record. Judicial notice of the trial record means that the court will consider all the facts introduced at trial as part of your motion.<sup>17</sup> For example, if someone was convicted of rape, and at trial no evidence showed that the victim had intercourse with anyone besides her attacker for 24 hours before the crime, the court can find that there is a substantial likelihood that the convicted person would not have been convicted if DNA testing showed the semen found in the rape victim was not his.

Even though asking the court to take judicial notice may be enough to have your motion granted, you still should explain why the evidence is relevant to your case and why, if the results had been known at trial, you would not have been convicted. If you just ask the court to take judicial notice, without adding any explanation, the court may decide that the facts do not show how the DNA evidence would have made a difference in the outcome of your trial. First, you should point out weaknesses in the case against you at trial. Then, you should include any other facts from the trial that indicate your innocence. Finally, you should explain to the court how a favorable DNA test will make a difference in your case. The following paragraph is an example of such an explanation:

At trial, the state claimed that there was only one robber. The victim cut the robber's leg with a kitchen knife. If the blood on the kitchen knife excludes me as a source, it shows that the robber was someone else. If the trial court had known that information, there is substantial likelihood that I would not have been convicted.

You should also explain why the evidence was not tested. If it was DNA tested before, you will have to explain to the court that DNA testing methods have gotten better since your trial and it is reasonably likely that new results will be more helpful than the old results. Even if methods of DNA testing have gotten better and the result would now be more accurate, the court will still deny the motion if the newer DNA test is not reasonably likely to provide more information about the case. To avoid this scenario, you should explain in detail how the results

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<sup>14</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(E) (2017).

<sup>15</sup> LA. CODE CRIM. PROC. ANN. art. 930.3(7) (2017); *see also* State v. Robertson, No. 42-247, pp. 1–3 (La. App. 2 Cir. 6/25/07); 958 So. 2d 787, 787–789, *writ denied* 2007-1634 (La. 5/9/08); 980 So. 2d 682 (finding DNA testing would not provide clear and convincing evidence of innocence because there was sufficient evidence to support the applicant's conviction for rape: the victim identified the applicant, fingerprints alleged to match the applicant were recovered from the crime scene, and seminal fluid of the same blood type as the applicant's was found); LA. CODE CRIM. PROC. ANN. art. 930.2 (2017) (“The petitioner in an application for post conviction relief shall have the burden of proving that relief should be granted.”). “Clear and convincing evidence” means that it is “highly probable or reasonably certain” that you are factually innocent. It is a greater burden than “preponderance of the evidence” (the standard for civil trials), but less than “evidence beyond a reasonable doubt” (the standard for criminal trials). Black's Law Dictionary 636 (9th ed., 2009).

<sup>16</sup> *But see* State v. Johnson, 2007-0475, p. 15 (La. App. 1 Cir. 10/10/07); 971 So. 2d 1124, 1131, *writ granted* 2007-2034 (La. 6/6/08); 983 So. 2d 907 (finding DNA testing excluded defendant as source of DNA found under victim's fingernails but did not prove by clear and convincing evidence that defendant was factually innocent of second-degree murder since the victim's fingernail scrapings were not necessarily from the assailant during the attack, another male's DNA could have been transferred to victim's fingernails by other methods, and defendant had placed himself at the scene of the crime and told police the unusual circumstances of the murder); State v. Edwards, 43-802, p. 2 (La. App. 2 Cir. 8/7/08); 988 So. 2d 850, 851, *writ denied* 2008-2476 (La. 8/20/09); 15 So. 3d 1009 (defendant was denied DNA testing of a cap and blood traces found at crime scene since neither would prove defendant's factual innocence).

<sup>17</sup> *See* LA. CODE EVID. ANN. art. 201 (2017).

of the new DNA test will shed new light on your claim of innocence. The following paragraph is an example of such an explanation:

The original DNA test of blood on the doorknob showed the blood did not come from me but could have come from the victim. The new and more accurate test might be able to show the blood did not come from the victim either. If the new test shows the blood is not from the victim, the test would prove that someone else was at the crime scene, which would be *probative*<sup>18</sup> because two witnesses said there was only one attacker.

If the evidence was not DNA tested before, the court is more likely to grant the motion if you can show that there was no testing available at the time of your trial that would have provided useful results. If this is the case, you should write in your motion that the evidence was not DNA tested and that no testing available at the time could have provided those meaningful results. If you can, try to get an affidavit from an expert in DNA testing that explains that there was no useful testing available at the time of your trial. If testing was available, it is helpful to your case if you can show either that it was not your fault that the evidence was not tested or that it would be *in the interests of justice* (fairness) to allow it now.

b. Establishing the timeliness of the application

Your motion for DNA testing will be dismissed if you have not first appealed your conviction.<sup>19</sup> You must also show that your motion has been timely filed in order to avoid having it dismissed.<sup>20</sup> A motion for DNA testing will be accepted as timely at any time before August 31, 2019.

On or after August 31, 2019, this “timeliness” requirement means that you must file your application within two years after your judgment of conviction and sentence has become final<sup>21</sup>. If more than two years have gone by, you may still submit a motion if you qualify under one of these exceptions:<sup>22</sup>

- 1) The application alleges, and the petitioner proves or the state admits, that the facts upon which the claim is predicated were not previously known to the petitioner or his attorney;<sup>23</sup>
- 2) The petitioner’s claim is based on a newly established interpretation of constitutional law that retroactively applies to the petitioner’s case, and the petition is filed within one year of the final ruling;
- 3) The person asserting the claim has been sentenced to death.

If more than two years have passed since your sentence became final, you should look closely at these exceptions to see if one applies to your case. Otherwise, you will not be able to go forward with your motion. For instance, if you have been sentenced to death, the timeliness requirement does not apply to you, and you may submit an application at any time.

Otherwise, the most likely exception to apply is the first (“unknown fact”) exception. In order to claim this exception, you will want to show that you did not seek a DNA test within two years of your conviction becoming final due to a fact that was unknown to you at the time and that you have only recently learned. A late realization that an error may have occurred at trial does not count as the discovery of a new fact.<sup>24</sup> In addition, you cannot use the fact that you were incarcerated or did not have a lawyer as an excuse for not having discovered the fact earlier.<sup>25</sup> Rather, you will need to show that discovering the new fact was out of your control. The following paragraph is an example of such an explanation:

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<sup>18</sup> “Probative” means tending to show proof (of your innocence).

<sup>19</sup> LA. CODE CRIM. PROC. ANN. art. 924.1 (2017).

<sup>20</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(C)(2) (2017).

<sup>21</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(A)(1) (2017); LA. CODE OF CRIM. PROC. art. 930.8(A) (2017).

<sup>22</sup> LA. CODE OF CRIM. PROC. art. 930.8(A) (2017).

<sup>23</sup> See *State v. Parker*, 1998-0256, p. 1 (La. 5/8/98); 711 So. 2d 694, 695 (defendant’s late realization that an error may have occurred at trial did not qualify as discovery of new fact); see also *Carlin v. Cain*, 97-2390, pp. 1–2 (La. 3/13/98); 706 So. 2d 968, 968 (holding that this exception requires no “diligence” of an inmate).

<sup>24</sup> *State v. Parker*, 1998-0256, p. 1 (La. 5/8/98); 711 So. 2d 694, 695.

<sup>25</sup> *State v. Obney*, 99-592, p. 5 (La. App. 3 Cir. 8/11/99); 746 So. 2d 24, 27, *writ denied*, 1999-2667 (La. 5/5/00); 760 So. 2d 1190 (rejecting lack of counsel as excuse for late discovery of civil trial testimony).

Although the final sentencing occurred over two years ago, the State withheld exculpatory evidence (evidence that helps prove you didn't commit a crime) that did not come to light until recently. Thus, this application for post-conviction relief is not time-barred and should not be dismissed.

c. Identifying the Evidence You Want Tested

You must identify exactly what items of evidence you want tested or re-tested.<sup>26</sup> This evidence may have been collected as part of the investigation of the original crime or it may be newly discovered evidence.<sup>27</sup> Finding evidence can be difficult. A big part of finding evidence is understanding the difference between biological evidence that was introduced at your trial (for instance, a bloody shirt) and evidence that was collected during the investigation, but not introduced at your trial (for instance, a rape kit—the evidence collected from a rape victim when she was examined by a doctor). You do not need to actually locate the evidence you want tested. You only need to prove that it was either collected during the course of the investigation or introduced into evidence at your trial (or both). The evidence to be tested has to be available and in a condition that would permit DNA testing.<sup>28</sup> Because biological material can deteriorate and make it difficult to test, not all evidence is in a condition that would allow for testing.

DNA evidence must conform to the Louisiana Code of Evidence to be admissible.<sup>29</sup> Mostly, this requires that the evidence be reliable.<sup>30</sup> If the reliability of the evidence, combined with the “chain of custody” as a whole, render the sample unreliable, it must be excluded from evidence.<sup>31</sup> Chain of custody means that the evidence was never out of police control. Therefore, it may be helpful to establish that there was a chain of custody, which can be demonstrated through police records showing that the evidence was never out of police control. Since you probably will not know the condition of the DNA or whether there was a chain of custody, you should ask the court in your motion to find out.

Your motion should be very specific about what you want tested. You must refer to biological material, such as blood, semen, saliva, hair, skin, or sweat, that you already know exists. You cannot have a piece of evidence tested just to see if it might have biological material on it. Tell the court exactly what evidence you want tested. The court is more likely to grant your motion if it knows specifically what evidence you want tested. Examples of specific requests include “the bloodstain on the lower left side of the victim's t-shirt” and “the saliva on the cigarette found outside the door of the victim's house.”

d. Signing an affidavit

Finally, your motion must include a signed affidavit stating that you are factually innocent of the crime for which you were convicted. Factually innocent means that you did not commit the crime, not just that you should not have been convicted because of legal problems with your conviction. An affidavit is simply a written statement made under oath and notarized. Since these statements are under oath, everything you write in them must be truthful. If they are found to be untruthful, you could be charged with perjury or contempt of court.

It is a good idea to attach affidavits (sworn statements) wherever possible to make your claim stronger. When identifying the evidence you want tested, you can attach an affidavit saying someone told you the evidence exists. For example, if you remember that a police officer told you that a bloody sock was collected during the investigation, you should attach an affidavit saying so.

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<sup>26</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(B)(3) (2017).

<sup>27</sup> See LA. CODE CRIM. PROC. ANN. art. 851(B) (2017); *State v. Jason*, 2001-1428, pp. 7–8 (La. App. 3 Cir. 7/10/02); 820 So. 2d 1286, 1290–1291 (denying motion because “the trial record contain[ed] no mention of semen analysis or of DNA analysis,” nor did the defendant “suggest that this might be newly discovered evidence”).

<sup>28</sup> “Relief under this Article shall not be granted when the court finds that there is a substantial question as to the integrity of the evidence to be tested.” LA. CODE CRIM. PROC. ANN. art. 926.1(D) (2017).

<sup>29</sup> LA. REV. STAT. § 15:441.1 (2017).

<sup>30</sup> Louisiana law requires you to show that the item you offer as evidence is the original and has not changed. See LA. CODE EVID. ANN. art. 901(A) (2017). This does not necessarily mean that you need to demonstrate a so-called “chain of custody” (unbroken record of police control of the evidence from the time it is collected to the time it is presented in court) as proof of authenticity. See LA. CODE EVID. ANN. art. 901(A) cmt. D (2017).

<sup>31</sup> *Cole v. State ex rel. Dept. of Transp. & Dev.*, 1999-912, p. 10 (La. App. 3 Cir. 12/22/99); 755 So. 2d 315, 324, *writ denied* 2000-0199 (La. 4/7/00); 759 So. 2d 766 (requiring party seeking to introduce a blood alcohol test result “to lay a proper foundation, which . . . relates not only to the chain of custody, but also to the integrity and reliability of the chemical test.”).

It is very helpful to get affidavits from experts in DNA testing in order to explain to the court how previous DNA testing methods were not adequate or how the methods have improved. This information is very technical and complicated, and the court is much more likely to accept your claim if it is backed up by an expert. See the list in Appendix A at the end of this Chapter for names of legal organizations that may be able to help you find a DNA expert who could provide an affidavit.

Affidavits are also useful for supporting other claims. For example, you can use an affidavit to show that there is a good chance you would not have been convicted if the evidence had been tested at trial and that the identity of the perpetrator was an issue in the case. You do not need an affidavit simply to talk about what is in the trial record. However, any time you are telling the court new information that comes from your personal knowledge, an affidavit will make your claim stronger because it is a sworn statement.<sup>32</sup> If you are innocent, an affidavit stating that you are innocent might help your claim that there is a good chance that you would not have been convicted if DNA testing had been done. You should also attach an affidavit stating that you are not seeking this motion simply to delay the execution of your sentence.

## 2. Getting Counsel to Help You

Under Article 930.7, if you are indigent (poor) and cannot afford a lawyer, you may be able to have a lawyer appointed to you by the court.<sup>33</sup> You are not entitled to a lawyer to file your motion for you, though, unless it was ordered by the trial court.<sup>34</sup> However, if you are indigent, you will be appointed a lawyer later on when the court orders an evidentiary hearing, authorizes a deposition (the under-oath questioning of someone connected to the case), or requests admissions of fact.<sup>35</sup>

You may also obtain a free copy of the transcript from your trial, including sentencing, if you can show that you have a particular need for it.<sup>36</sup> That is, you must show that your claim is not frivolous—that your claim has a serious purpose—and the transcript is needed to decide the issue presented.<sup>37</sup> For additional information about obtaining a lawyer, *see* Section F.

## C. THE STATE'S RESPONSE TO YOUR MOTION, POSSIBLE HEARING, AND THE COURT'S DECISION

### 1. The State's Response to Your Motion for DNA Testing

Once the court receives your motion for DNA testing, it will try to find the DNA evidence that is to be tested.<sup>38</sup> It will then serve a copy of the application to the district attorney and the law enforcement agency which has possession of the evidence to be tested, including but not limited to sheriffs, the office of state police, local police agencies, court clerks, and crime laboratories.<sup>39</sup> The custodian of the DNA evidence, through the district attorney in the parish where you were convicted, must provide an answer on the merits of your motion within 30 days unless the district attorney files a procedural objection or the court dismisses your motion for a reason described below.<sup>40</sup>

Once you submit your motion, there are several potential outcomes to your case:

#### a. Procedural Objection

The district attorney may file a procedural objection to your motion.<sup>41</sup> For example, the district attorney may object that the court lacks personal jurisdiction to hear your motion,<sup>42</sup> or your claim may be barred because you

<sup>32</sup> Remember that you cannot make untrue statements in a sworn affidavit. If you do so, you could be punished with perjury charges or contempt.

<sup>33</sup> LA. CODE CRIM. PROC. ANN. art. 930.7(A) (2017).

<sup>34</sup> State v. Obney, 99-592, p. 5 (La. App. 3 Cir. 8/24/99); 746 So. 2d 24, 27, *writ denied*, 1999-2667 (La. 5/5/00); 760 So. 2d 1190.

<sup>35</sup> LA. CODE CRIM. PROC. ANN. art. 930.7(C) (2017).

<sup>36</sup> State *ex rel.* Simmons v. State, 94-2879, pp. 1–2 (La. 12/16/94); 647 So. 2d 1094, 1095.

<sup>37</sup> United States v. MacCollom, 426 U.S. 317, 326, 96 S. Ct. 2086, 2092, 48 L.Ed.2d 666 (1976); State *ex rel.* Nash v. State, 92-1307, p. 1 (La. App. 1 Cir. 1992); 604 So. 2d 1054, 1054.

<sup>38</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(F) (2017).

<sup>39</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(F) (2017).

<sup>40</sup> LA. CODE CRIM. PROC. ANN. art. 927(A) (2017).

<sup>41</sup> LA. CODE CRIM. PROC. ANN. art. 927 (2017).

<sup>42</sup> That is, the motion should have been filed in a different court.

have an appeal pending.<sup>43</sup> If this happens, the court will not order an answer until it considers the objections and rules on them.<sup>44</sup> You may have to amend your motion in order to comply with the court's ruling.

**b. Dismissal upon the Pleadings**

If your motion fails to allege a claim which, if established, would entitle you to relief (didn't put enough information into your motion), then it will be dismissed by the court without an answer.<sup>45</sup> This is why it is important to include as much information as possible to show that a favorable DNA test will make a difference in your case and to be specific about the evidence that you want tested.

**c. Summary Disposition**

The court may decide that the factual and legal issues can be resolved without further proceedings and grant or deny relief right away.<sup>46</sup> For instance, if the record clearly shows that your conviction would be allowed no matter what a DNA test might show, then relief may be denied without a further hearing. In other cases, the court may decide that some expansion of the record (that the court needs more information to decide your case) is necessary but that the case can be decided without a full evidentiary hearing.<sup>47</sup>

**d. Evidentiary Hearing**

If the court decides there are questions of fact that cannot be resolved by summary disposition, it will order an evidentiary hearing.<sup>48</sup>

**2. Hearing on your Motion**

The court is allowed to hold a hearing to help it decide whether or not to grant the motion. However, the court does not have to hold a hearing and can decide based only on the written submissions, which include your motion and the state's response. You may or may not be allowed to participate at the evidentiary hearing depending on the types of evidence to be received by the court.<sup>49</sup> If you are incarcerated and allowed to participate, this may mean using teleconference, video link, or other visual remote technology rather than appearing in person.<sup>50</sup> In the hearing, as throughout the application process, you will have the burden of proving that DNA testing should go forward.<sup>51</sup>

**3. Decision on Your Motion**

Once the court receives all the information it needs, it will decide whether your motion meets the requirements of Article 926.1 and either order DNA testing or deny your motion. If you meet your burden under the statute, the court will likely order the testing.

**D. APPEALING THE COURT'S DECISION IF YOUR MOTION IS DENIED**

There is no right to appeal from a judgment dismissing your motion or otherwise denying relief.<sup>52</sup> The Courts of Appeal do have supervisory jurisdiction, meaning it can use its discretion to review any trial case.<sup>53</sup> However, this is an extraordinary measure that is not often taken. Thus, the judgment of the trial court is generally final.

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<sup>43</sup> See LA. CODE CRIM. PROC. ANN. art. 924.1 (2017) (requiring the petitioner to exhaust his right of appeal before applying for post-conviction relief).

<sup>44</sup> LA. CODE CRIM. PROC. ANN. art. 927(A) (2017).

<sup>45</sup> LA. CODE CRIM. PROC. ANN. art. 928 (2017).

<sup>46</sup> LA. CODE CRIM. PROC. ANN. art. 929(A) (2017).

<sup>47</sup> LA. CODE CRIM. PROC. ANN. art. 929 (2017).

<sup>48</sup> LA. CODE CRIM. PROC. ANN. art. 930 (2017).

<sup>49</sup> LA. CODE CRIM. PROC. ANN. art. 930 (2017). Note that you may not be entitled to be present at the hearing if the only evidence to be received includes duly authenticated records, transcripts, depositions, documents, or portions thereof, or admissions of facts, and you have been or will be provided with copies of such evidence and an opportunity to respond to the evidence in writing.

<sup>50</sup> LA. CODE CRIM. PROC. ANN. art. 930.9 (2017)

<sup>51</sup> LA. CODE CRIM. PROC. ANN. art. 930.2 (2017).

<sup>52</sup> LA. CODE CRIM. PROC. ANN. art. 930.6(A) (2017); *State v. Walker*, 94-340, p. 3 (La. App. 5 Cir. 10/25/94); 645 So. 2d 766, 768.

<sup>53</sup> LA. CODE CRIM. PROC. ANN. art. 930.6 (2017).

## E. AFTER YOUR MOTION FOR DNA TESTING HAS BEEN GRANTED

### 1. Getting the DNA Tested

If the court grants your motion for DNA testing, it will issue orders to obtain the samples and to protect their integrity.<sup>54</sup> At this point, no evidence may be destroyed until the case has been resolved.<sup>55</sup> The testing will be performed by a laboratory that you and the district attorney agree upon.<sup>56</sup> If a laboratory cannot be agreed upon, the court will choose a laboratory for you instead.<sup>57</sup> If the court chooses a private laboratory, the district attorney has the right to withhold a sufficient portion of the evidence to have it tested independently.<sup>58</sup>

During this process, your DNA profile will be sent by the district attorney to the state police and put in the state DNA database.<sup>59</sup> In the event your conviction is reversed, you may request to have your DNA record removed from this database.<sup>60</sup>

### 2. Getting a New Trial Based on the Results of the DNA Tests

When the results are known, they will be filed by the laboratory with the court and served to you and to the district attorney.<sup>61</sup> A new trial will be granted if the results of the DNA tests prove by clear and convincing evidence that you are factually innocent of the crime for which you were convicted.<sup>62</sup>

## F. LEGAL ASSISTANCE FOR THOSE SEEKING POST-CONVICTION DNA TESTING

Appendix A contains a list of not-for-profit organizations that may be able to provide you with legal assistance if you do not have a lawyer and would like help in filing a motion for DNA testing. Because these organizations get many requests for help, they are unable to help everyone who contacts them and often have to choose among many worthy cases. As a result, you may want to contact multiple organizations to see if any of them can help you.

To request the help of an organization, you should mail them a letter. The letter should include a summary of the facts of your case and the evidence used against you. If you can, you should specify what biological evidence from your case, such as semen, blood, saliva, hair, skin, or sweat, you would like tested for DNA and why you believe that evidence will show you are innocent. If possible, you should include the last known location of this evidence. Your letter should also include your name, your prison identification number, and your mail address.

These organizations receive many letters, so they may not be able to respond to your letter for some time. Because of this, you should not mail them any of your legal documents unless or until they ask you to, since you may need these documents in the meantime.

## G. CONCLUSION

If you believe there is biological evidence that may prove your innocence of the crime for which you were convicted, you may be able to obtain DNA testing under Article 926.1 of the Louisiana Code of Criminal Procedure. If you want to file a motion to obtain DNA testing, you should follow the procedures outlined above. You will find a list of organizations that may be able to provide you with legal assistance in Appendix A.

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<sup>54</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(F) (2017).

<sup>55</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(H)(2) (2017).

<sup>56</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(F) (2017).

<sup>57</sup> The court will choose a laboratory that is accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) in forensic DNA analysis. LA. CODE CRIM. PROC. ANN. art. 926.1(F) (2017).

<sup>58</sup> “Under such circumstances, the petitioner shall submit DNA samples to the district attorney for purposes of comparison with the unknown sample retained by the district attorney. A laboratory selected to perform the analysis shall, if possible, retain and maintain the integrity of a sufficient portion of the unknown sample for replicate testing. If after initial examination of the evidence, but before actual testing, the laboratory decides that there is insufficient evidentially significant material for replicate tests, then it shall notify the district attorney in writing of its finding.” LA. CODE CRIM. PROC. ANN. art. 926.1(G) (2017).

<sup>59</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(I) (2017); *see also* LA. REV. STAT. ANN. § 15:614 (2017).

<sup>60</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(I) (2017); *see also* LA. REV. STAT. ANN. § 15:614 (2017).

<sup>61</sup> LA. CODE CRIM. PROC. ANN. art. 926.1(H) (2017).

<sup>62</sup> *See* LA. CODE CRIM. PROC. ANN. art. 930.3 (2017); *State v. Johnson*, 2007-0475, p. 15 (La. App. 1 Cir. 10/10/07); 971 So. 2d 1124, 1125; *writ granted*, 2007-2034 (La. 6/6/08), 983 So. 2d 907 (new trial denied because results of DNA testing did not prove by clear and convincing evidence the factual evidence of the defendant).

## APPENDIX A

### ORGANIZATIONS THAT MAY BE ABLE TO ASSIST YOU IN OBTAINING DNA TESTING

**Innocence Project, Inc.**

40 Worth Street, Suite 701

New York, NY 10013

Phone: (212) 364-5340

Email: [info@innocenceproject.org](mailto:info@innocenceproject.org)

Website: [www.innocenceproject.org](http://www.innocenceproject.org)

**Innocence Project New Orleans**

4051 Ulloa Street

New Orleans, LA 70119

Phone: (504) 943-1902

Fax: (504) 943-1905

Website: [www.ip-no.org](http://www.ip-no.org)

## CHAPTER 5: HABEAS CORPUS

### A. INTRODUCTION

This section discusses the writ of habeas corpus in Louisiana. The writ of habeas corpus is a legal action that requires a person under arrest to be brought before a judge or into court to determine whether they are being lawfully held in custody. If they are being unlawfully held, they must be immediately released. The *JLM* has other chapters that provide a more thorough introduction to habeas corpus, including federal habeas corpus<sup>1</sup> and state habeas corpus generally.<sup>2</sup> This chapter will explain how, when, and where to file your petition for a writ of habeas corpus, as well as the circumstances in which Louisiana law allows you to be released on habeas grounds.

### B. PROCEDURE FOR FILING

#### 1. Eligibility—who may file?

Habeas corpus in Louisiana is available to anyone in custody as part of an ongoing or expected criminal proceeding.<sup>3</sup> However, in Louisiana, habeas corpus is not available for post-conviction relief, which is governed by a separate set of rules and procedures.<sup>4</sup> In other words, you can only file a writ of habeas corpus if you have not yet been convicted, and you cannot use habeas corpus to challenge either a conviction or a sentence.<sup>5</sup>

There are some limited circumstances in which you may use a habeas petition post-conviction, as long as you are not challenging your conviction or your sentence. For instance, a habeas petition has been used to argue that the time the petitioner had already spent in custody had been miscalculated.<sup>6</sup> Of crucial importance, though, was the fact that the petitioner was arguing that he was entitled to immediate release: had he not argued that he was entitled to immediate release, the “proceeding would not be a post-conviction habeas corpus because the prisoner would not be unlawfully detained at that point in time.”<sup>7</sup> Even if you can fit within one of these exceptions, you cannot petition for habeas as long as you can appeal or as long as your appeal is pending.<sup>8</sup>

##### a. Venue—Where to File Your Application

Your application for a writ of habeas corpus should be filed in the district court in the parish where you are in custody.<sup>9</sup> This is different from the procedure for filing post-conviction challenges, which are filed in the parish in which you were convicted.<sup>10</sup> If your habeas petition involves challenging any

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<sup>1</sup> See the main *JLM*, Chapter 13, “Federal Habeas Corpus.”

<sup>2</sup> See the main *JLM*, Chapter 21, “State Habeas Corpus: Florida, New York, and Texas.”

<sup>3</sup> LA. CODE CRIM. PROC. ANN. art. 351 (2017) (defining “custody” as “detention or confinement as a result of or incidental to an instituted or anticipated criminal proceeding”).

<sup>4</sup> The Code of Criminal Procedure explicitly provides that habeas corpus is “not available to persons entitled to file an application for post[-]conviction relief[.]” LA. CODE CRIM. PROC. ANN. art. 351 (2017); see also *Madison v. Ward*, 2000-2842, pp. 5–6 (La. App. 1 Cir. 7/3/02); 825 So. 2d 1245, 1250–1251 (noting that habeas corpus “is not the proper procedural device for petitioners who may file applications for post-conviction relief”). For information about post-conviction relief, see Chapter 2 of the *Louisiana State Supplement*; LA. CODE CRIM. PROC. ANN. art. 924 (2017).

<sup>5</sup> *Madison v. Ward*, 2000-2842, p. 6 (La. App. 1 Cir. 7/3/02); 825 So. 2d 1245, 1251.

<sup>6</sup> See *State ex rel. Bartie v. State*, 501 So. 2d 260, 263–264 (La. Ct. App. 1986) (petitioner argued that he was not given credit for time spent in a halfway house or on parole).

<sup>7</sup> *State ex rel. Bartie v. State*, 501 So. 2d 260, 264 n.3 (La. Ct. App. 1986); see also *Sinclair v. Kennedy*, 96-1510, p. 7 (La. App. 1 Cir. 9/19/97); 701 So. 2d 457, 461 (holding that petitioner’s argument that the parole board did not afford him due process in considering his application was a proper subject for habeas petition).

<sup>8</sup> LA. CODE CRIM. PROC. ANN. art. 363 (2017); *State v. Linkletter*, 345 So. 2d 452, 460 (La. 1977).

<sup>9</sup> LA. CODE CRIM. PROC. ANN. art. 352 (2017) (“Habeas corpus proceedings by or on behalf of a person in custody shall be instituted in the parish in which the person is in custody.”); *State ex rel. Lay v. Cain*, 96-1247, p. 4 (La. App. 1 Cir. 2/14/97); 691 So. 2d 135, 137.

<sup>10</sup> LA. CODE CRIM. PROC. ANN. art. 352, cmt. (b) (2017).



action of the parole board, it should be filed in East Baton Rouge Parish, regardless of where you are incarcerated.<sup>11</sup>

b. The Application—What to Include

Your application for a writ of habeas corpus should include the following items:<sup>12</sup>

- 1) Your name and the place where you are being held.
- 2) The name of the person holding you, or some description of him.
- 3) A statement of the facts on which your petition is based. In other words, the facts that you think entitle you to a writ of habeas corpus. This statement can be supported by affidavits filed with the petition.

Your application should be addressed to the court you think has jurisdiction to hear it (that is, the district court in the district where you are being held in custody) and should bear your signature. If you are being held in custody under a court order, you should attach a copy of the court order, if possible.<sup>13</sup>

Once the court receives your application, it will consider whether to grant the writ of habeas corpus (whether to instruct the person holding you in custody to bring you before the court and respond to your allegations). Unless the court can tell from your petition itself that you are not entitled to be released, it will grant the writ.<sup>14</sup> Once the writ is granted, the custodian will have a maximum of 72 hours to file an answer.<sup>15</sup> The custodian will then provide an answer explaining why he is entitled to keep you in custody and will bring you to court for a hearing.<sup>16</sup>

C. HEARING PROCESS

At the hearing, the court will hear why you think you are entitled to immediate release, as well as why your custodian thinks you are not entitled to release. The exact character of the hearing will vary depending on what the court thinks is necessary to decide your issue. Generally, there is no constitutional right to be represented by counsel in habeas hearings,<sup>17</sup> but in Louisiana you *are* entitled to be represented by counsel if your hearing is evidentiary.<sup>18</sup> An evidentiary hearing is an adversary proceeding in which you present your claims and introduce testimony and other evidence to support them.<sup>19</sup>

D. WHEN RELIEF MAY BE GRANTED

If you are being held in custody under a court order, you can get relief by showing any one of the following things.<sup>20</sup>

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<sup>11</sup> State *ex rel.* Lay v. Cain, 96-1247, p. 4 (La. App. 1 Cir. 2/14/97); 691 So. 2d 135, 137 (noting that all actions contesting computation of sentences, discharge, and good time dates should be filed in the East Baton Rouge Parish).

<sup>12</sup> LA. CODE CRIM. PROC. ANN. art. 353 (2017).

<sup>13</sup> If you have asked for a copy of the court order and have not been given one you should make note of this in your application. LA. CODE CRIM. PROC. ANN. art. 353 (2017).

<sup>14</sup> LA. CODE CRIM. PROC. ANN. art. 354 (2017).

<sup>15</sup> LA. CODE CRIM. PROC. ANN. art. 354 (2017).

<sup>16</sup> LA. CODE CRIM. PROC. ANN. art. 357 (2017). If the custodian cannot bring you before the court, he is required to tell the court why, and if the court is not satisfied with his explanation the court can require the custodian to immediately produce you. LA. CODE CRIM. PROC. ANN. art. 359 (2017).

<sup>17</sup> Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993 (1987).

<sup>18</sup> See State *ex rel.* Cherry v. Cormier, 281 So. 2d 99, 103 (La. 1973) (“[E]xcept under special circumstances where counsel will not be of assistance, appointment of counsel to represent a habeas petitioner at his evidentiary hearing is necessary to insure a full, fair, and impartial proceeding.”).

<sup>19</sup> State *ex rel.* Cherry v. Cormier, 281 So. 2d 99, 103 (La. 1973); LA. CODE CRIM. PROC. ANN. art. 930 (2017) (“An evidentiary hearing for the taking of testimony or other evidence shall be ordered whenever there are questions of fact which cannot properly be resolved pursuant to Articles 928 [‘Dismissal upon the pleadings’] and 929 [‘Summary disposition’].”).

<sup>20</sup> LA. CODE CRIM. PROC. ANN. art. 362 (2017).

- 1) The court has exceeded its jurisdiction.
- 2) The custody was lawful, but has become unlawful.
- 3) The order for custody is legally deficient.<sup>21</sup>
- 4) The order for custody imposes an illegal custody.
- 5) The custodian is not the person allowed by law to keep you in custody.
- 6) You have been denied your right to a hearing in an extradition case (involves the transfer of prisoners across international borders).
- 7) You are being held in custody prior to trial in violation of due process of law.

Most habeas petitions are based on subsection 2), arguing that custody may have been lawful at one time (for instance, when the initial arrest was made) but has since become unlawful. If you are arrested without a warrant, Louisiana law requires that a judge determine that there is probable cause to keep you in custody within 48 hours of your arrest.<sup>22</sup> State law also requires that you be brought before a judge so counsel can be appointed to you within 72 hours of your arrest; however, Saturdays, Sundays and legal holidays do not count toward those 72 hours.<sup>23</sup> If the person holding you in custody fails to do either of these things, your initially lawful custody becomes unlawful and you are entitled to be released on a habeas petition.<sup>24</sup> Being released on habeas grounds does not, however, give you absolute immunity; you can be rearrested for the same conduct.<sup>25</sup>

This provision is also sometimes used to challenge post-conviction parole issues. While you cannot use a habeas petition to challenge the validity of your conviction or your sentence, you can sometimes use it to challenge certain parole issues if you think you are entitled to immediate release. Courts have allowed the use of habeas petitions to challenge a transfer from jail to prison<sup>26</sup> and the computation of a release date,<sup>27</sup> but in recent years it has become harder to use habeas to challenge actions of the parole board.<sup>28</sup> If you are going to use habeas to challenge parole board actions, you must argue that you are entitled to immediate release, and you cannot challenge the validity of your sentence or a time computation.<sup>29</sup>

## E. BURDEN OF PROOF

If you are being held without a court order, the burden is on the person holding you (the custodian) to prove that the detention is legal and that you should not be released.<sup>30</sup> But if you are being

<sup>21</sup> While you can use this provision to challenge the warrant used for your arrest, Louisiana law allows the court to simply fix whatever defect the warrant had and keep you in custody as long as there is probable cause. LA. CODE CRIM. PROC. ANN. art. 364 (2017).

<sup>22</sup> LA. CODE CRIM. PROC. ANN. art. 230.2 (2017).

<sup>23</sup> LA. CODE CRIM. PROC. ANN. art. 230.1 (2017).

<sup>24</sup> See *State v. Wallace*, 09-1621, pp. 9–10 (La. 11/6/09); 25 So. 3d 720, 726–727 (holding that violation of the 48-hour rule cannot be cured by a later probable cause determination); *State v. Chaney*, 384 So. 2d 442, 445–447 (La. 1980) (ordering defendant's release on habeas petition for failure to comply with the 72-hour rule).

<sup>25</sup> LA. CODE CRIM. PROC. ANN. art. 367 (2017); *State v. Watkins*, 399 So. 2d 153, 156 (La. 1981) (indicating that warrantless rearrest after release on habeas grounds is not justifiable without probable cause or without any exigent circumstances that made it impossible to obtain a warrant); *State v. Wallace*, 392 So. 2d 410, 413–414 (La. 1980) (holding that an arrested person released on habeas grounds for violation of the 72-hour rule does not enjoy immunity from rearrest).

<sup>26</sup> *State ex rel. Lay v. Cain*, 96-1247, p. 3 (La. App. 1 Cir. 2/14/97); 691 So. 2d 135, 137.

<sup>27</sup> *Mole v. Louisiana Board of Parole*, 93-1524 (La. App. 1 Cir. 5/20/94); 637 So. 2d 785, 786.

<sup>28</sup> Interpreting the Corrections Administrative Remedy Procedure, *Madison v. Ward* concluded that habeas petitions were not the proper procedure for challenging decisions of the parole board unless the board denied the inmate's right to a hearing. *Madison v. Ward*, 2000-2842, p. 5 n.7 (La. App. 1 Cir. 7/3/02); 825 So. 2d 1245, 1250 n.7 (“[P]leadings challenging actions of the parole board other than failure to act in accordance with [LA. REV. STAT.] 15:574.9, whether styled as writs of habeas corpus or captioned in some other fashion, should be dismissed ....”).

<sup>29</sup> *Madison v. Ward*, 2000-2842, p. 11 (La. App. 1 Cir. 7/3/02); 825 So. 2d 1245, 1254 (“A prisoner claiming he is entitled to *immediate release* under [art. 362] (on grounds other than those relative to time computations) would raise his challenge by writ of habeas corpus . . . .”); *Ferrington v. Louisiana Board of Parole*, 2003-2093, p. 4 (La. App. 1 Cir. 6/25/04); 886 So. 2d 455, 457.

<sup>30</sup> LA. CODE CRIM. PROC. ANN. art. 365 (2017); *State v. Antell*, 344 So. 2d 1058, 1058 (La. 1977) (“[I]f [defendant] is not incarcerated by virtue of an indictment . . . the burden of proof will be on the state to show probable cause.”).

held under a court order, the burden is on you to prove that the detention is illegal and that you should be released.<sup>31</sup>

## F. NO APPEAL

Generally, you cannot appeal a district court's ruling on your habeas petition. The Louisiana Code of Criminal Procedure says that higher courts simply do not have jurisdiction to hear appeals of habeas petitions.<sup>32</sup> For the most part, courts stick to this rule. Courts will often refuse to hear appeals of habeas cases.<sup>33</sup>

## G. CONCLUSION

If you believe that you are being unlawfully held in custody, you may file an application for a writ of habeas corpus in the district court of the parish where you are being held. While a writ of habeas corpus may be used to challenge the right of your custodian to keep you in custody, it cannot be used to challenge the validity of your underlying conviction or sentence. The most common type of habeas petition asserts that a prisoner's once lawful custody has become unlawful. Lawful custody may become unlawful if a prisoner is not brought before a judge or appointed counsel within the time required by state law. Before filing an application for a writ of habeas corpus, be sure to familiarize yourself with the habeas corpus chapters of the main *JLM*, Chapters 13 and 21.

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<sup>31</sup> LA. CODE CRIM. PROC. ANN. art. 365 (2017).

<sup>32</sup> LA. CODE CRIM. PROC. ANN. art. 369 (2017); *State v. Sheppard*, 350 So. 2d 615, 626 (La. 1977) ("It is well settled that this court does not have appellate jurisdiction of habeas corpus proceedings in criminal cases.").

<sup>33</sup> *See, e.g., State v. Sheppard*, 350 So. 2d 615, 626 (La. 1977); *State v. Howard*, 281 So. 2d 701, 702 (La. 1973) ("Article 369 [of the Louisiana Code of Criminal Procedure] plainly provides that there shall be no appeal from a judgment refusing to grant release upon a petition for a writ of habeas corpus. This bill, therefore, presents nothing for our review."); *State v. Ames*, 190 So. 2d 223, 225; 249 La. 685, 691 (La. 1966). On rare occasions, however, appellate courts will entertain appeals of habeas petitions by exercising their power of supervisory jurisdiction. *See State v. Roberts*, 90-1308 (La. 10/12/90); 568 So. 2d 1017, 1018 (reversing district court's denial of petition for habeas corpus and ordering petitioners' release when they were arrested more than six years after their convictions were affirmed); *State ex rel. Armistead v. Phelps*, 365 So. 2d 468, 468 (La. 1978) (granting supervisory writ on appeal of district court denial of habeas petition because district court did not afford petitioner a hearing or consider the merits of petition); *State ex rel. Smith v. Henderson*, 315 So. 2d 275, 275 (La. 1975) (reaching merits of habeas petition as an exercise of supervisory jurisdiction and then rejecting petition); *State ex rel. Lay v. Cain*, 96-1247, p. 4 (La. App. 1 Cir. 2/14/97); 691 So. 2d 135, 138 (concluding that action was a petition for habeas corpus rather than an action for post-conviction relief, vacating trial court's dismissal of action, and remanding to trial court for further proceedings). The Louisiana constitution gives higher courts "supervisory jurisdiction" over all criminal cases occurring within their circuits (in the case of the courts of appeals) or in the state (in the case of the supreme court). LA. CONST. art. V, § 10 ("[A court of appeal] has supervisory jurisdiction over cases which arise within its circuit."); LA. CONST. art. V, § 5(A) ("The supreme court has general supervisory jurisdiction over all other courts."). Yet, whether this supervisory jurisdiction permits appellate review of habeas petitions is a tricky question. *Compare* *United States ex rel. Jones v. Henderson*, 293 So. 2d 909, 909 (La. App. 3 Cir. 1974) ("A Louisiana court of appeal has neither appellate nor supervisory jurisdiction over matters arising out of commitment because of criminal proceedings."), *with State ex rel. Lay v. Cain*, 96-1247, p. 4 (La. App. 1 Cir. 2/14/97); 691 So. 2d 135, 138 ("This court has no appellate jurisdiction over a judgment refusing to grant a release upon a petition for a writ of habeas corpus . . . . Since we have the record before us, however, we shall treat this matter as a timely application for the exercise of our supervisory jurisdiction . . . .").

## CHAPTER 6: HOW TO PROTECT YOUR RIGHTS

### A. INTRODUCTION

This Chapter is an introduction to the topic of knowing your rights while in prison and knowing how to protect them. This Chapter addresses only claims regarding your prison conditions. For claims relating to the *cause* of your imprisonment or the *length* of your imprisonment, please read Chapters 2, 3, and 4 of the *Louisiana State Supplement*.

First, Part B will explain the difference between a tort action (a claim in court for personal injury and property damage) and the Administrative Remedy Procedure (the process where you try to resolve your problem through the prison's system for complaints). It will also discuss how they interact. (These topics will be discussed in more detail in Chapter 9 of the *Louisiana State Supplement—Inmate Grievance Procedures* and Chapter 10 of the *Louisiana State Supplement—Original Tort Actions*.) Part C will explain how to choose the proper court for your situation. Finally, Part D will teach you about the Louisiana Prison Litigation Reform Act ("LPLRA"). The LPLRA is meant to reduce the amount of prisoner litigation. It also makes it harder to file a claim under state law. It is important to learn about the LPLRA if you wish to file any claim under Louisiana state law because the LPLRA sets out many rules and restrictions that may apply to your claim.

### B. THE DIFFERENCE BETWEEN THE ADMINISTRATIVE REMEDY PROCEDURE AND A TORT ACTION

This Section will introduce you to two ways of addressing your claims: an administrative remedy procedure and a tort action. Because of "exhaustion" rules, which will be discussed below, you will typically ALWAYS want to address your claim through an Administrative Remedy Procedure, even if you also want to bring a tort action in court. This is because you may lose your ability to bring a tort action in court if you did not first use up, or "exhaust," the Administrative Remedy Procedure. This is very important to keep in mind and will be discussed more below. This Section will first give you an introduction to Louisiana's Administrative Remedy Procedure, and then introduce you to tort actions. Both of these topics will also be discussed in more detail in Chapter 9 of the *Louisiana State Supplement—Inmate Grievance Procedures* and Chapter 10 of the *Louisiana State Supplement—Original Tort Actions*.

#### 1. Louisiana's Administrative Remedy Procedure

This section will introduce you to Louisiana's Administrative Remedy Procedure (the "ARP"). Federal law<sup>1</sup> and Louisiana state law<sup>2</sup> both require you to exhaust (use up) all available administrative procedures before you take a complaint to federal or state court, so it is very important to use the ARP grievance procedure properly if you have a federal or state claim. Again, if you want to file a claim, you **MUST** first follow the Administrative Remedy Procedure or you will not be able to proceed in court. This is a brief introduction to the ARP, but the grievance procedure is actually very complicated. You should carefully read Chapter 9 of the *Louisiana State Supplement*, which explains in detail what you need to know about the ARP.

The ARP seeks to provide procedures for "receiving, hearing, and disposing of any and all complaints and grievances by [offenders] . . . within the custody or under the supervision of the

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<sup>1</sup> 42 U.S.C. § 1997e(a) (2012) ("No action shall be brought with respect to prison conditions under section 1983 of the Revised Statutes of the United States (42 U.S.C. § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").

<sup>2</sup> LA. REV. STAT. ANN. § 15:1184(A)(2) (2017) ("No prisoner suit shall assert a claim under state law until such administrative remedies as are available are exhausted. If a prisoner suit is filed in contravention of this Paragraph, the court shall dismiss the suit without prejudice."). This section applies to claims brought by prisoners in Louisiana state courts (unlike federal claims in footnote 1 above).

department, a contractor operating a private prison facility, or a sheriff.”<sup>3</sup> The laws creating the ARP are in the Louisiana Revised Annotated Statutes,<sup>4</sup> and the actual ARP guidelines are found in Title 22 of the Administrative Code of Louisiana.<sup>5</sup>

The ARP is a two-step system for reviewing prisoner complaints.<sup>6</sup> The first step you must take is to write a letter explaining the basis for your claim (what happened) and the relief that you seek (what result you want).<sup>7</sup> Unless your grievance involves sexual assault or extraordinary circumstances that would excuse you from the time limit, you must write to the Warden within ninety days of the incident you are complaining about.<sup>8</sup> The Warden must respond to you in writing within forty days from the date of your filing.<sup>9</sup> This is a step one decision. If you are unsatisfied with your step one decision, you can appeal this decision.<sup>10</sup> This appeal must be filed within five days of when you receive your step one decision.<sup>11</sup> The Warden then has forty-five days to respond to your appeal.<sup>12</sup> **BOTH** of these steps must be completed in order for the “exhaustion” requirement to be met before you can file your claim in state or federal court.<sup>13</sup>

Some claims are “grievable,” which means that you can raise a grievance about them. Others are “non-grievable,” which means you cannot make a grievance about them. The state legislature, state case law, and the policies of the Department of Public Safety and Corrections decide what “issues” are “grievable” for the purposes of addressing them through the ARP.<sup>14</sup> Part C of Chapter 9 of the *Louisiana State Supplement*, “Inmate Grievance Procedures in Louisiana,” explains how to figure out which group your claim fits into. There are also some “emergency grievances,” which have their own set of rules. These emergency grievances can only be used when waiting to follow the normal two-step process would cause major risk of injury or serious or lasting damage. The rules about these “emergency grievances” are explained in Part C(4) of Chapter 9 of the *Louisiana State Supplement*. The relief you can get from winning your grievance claim, or the grievance remedies, may include changing a policy or practice in your facility<sup>15</sup> or damages, which means that you get awarded money.<sup>16</sup> There is also a separate administrative remedy process for loss of property, which is explained in detail in Chapter 9, Part G of the *Louisiana State Supplement*.<sup>17</sup>

As stated in Chapter 15 of the main *JLM*, even if you believe that the grievance system in your prison is unfair or pointless, it is important that you still go through all of the steps of the process to try to resolve your grievance *before* you file a lawsuit in state or federal court.<sup>18</sup> Further, Chapter 14 of the main *JLM* states that even if you make a mistake or miss a deadline, a court may excuse your mistake if you can show the court that you made an honest, good-faith effort (you really tried) to meet as many of the requirements as you could. So even if the process seems hard or confusing, keep trying to go through all the steps of the grievance process.

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<sup>3</sup> LA. REV. STAT. ANN. § 15:1171(B) (2017).

<sup>4</sup> LA. REV. STAT. ANN. §§ 15:1171–15:1179 (2017).

<sup>5</sup> LA. ADMIN. CODE tit. 22 § 325(I) (2017).

<sup>6</sup> Step one is meant to investigate the complaint and step two is for appealing the decision from the step one level. LA. ADMIN. CODE tit. 22, §§ 325(G)(1), (J)(1)(B) (2017).

<sup>7</sup> LA. ADMIN. CODE tit. 22, § 325(G)(1)(A)(I)(A)–(B) (2017).

<sup>8</sup> LA. ADMIN. CODE tit. 22, § 325(G)(1) (2017).

<sup>9</sup> LA. ADMIN. CODE tit. 22, § 325(J)(1)(a)(ii) (2017).

<sup>10</sup> LA. ADMIN. CODE tit. 22, § 325(J)(1)(B)(I) (2017).

<sup>11</sup> LA. ADMIN. CODE tit. 22, § 325(J)(1)(B)(II) (2017).

<sup>12</sup> LA. ADMIN. CODE tit. 22, § 325(J)(1)(B)(IV) (2017).

<sup>13</sup> LA. ADMIN. CODE tit. 22, § 325(J)(1)(B)(IV) (2017).

<sup>14</sup> LA. REV. STAT. ANN. § 15:1171(B) (2017) (“Such complaints and grievances include but are not limited to any and all claims seeking monetary, injunctive, declaratory, or any other form of relief authorized by law . . .”).

<sup>15</sup> LA. REV. STAT. ANN. § 15:1171(B) (2017).

<sup>16</sup> LA. ADMIN. CODE tit. 22, § 325(K) (2017).

<sup>17</sup> LA. ADMIN. CODE tit. 22, § 325(L) (2017).

<sup>18</sup> If you receive a satisfactory remedy from the ARP, then there will be no need to go to court. If you are unsatisfied with the result of the ARP, you may then file a lawsuit in federal court.

## 2. Tort Actions

A tort action is a claim that arises when damage is caused to you by another.<sup>19</sup> When you are filing a claim, you will usually choose federal court if the tort happened in federal prison and state district court if the tort happened in state prison. Chapter 10 of the *Louisiana State Supplement* on Torts will explain in detail what you need to know about filing a tort claim. This chapter explains who you can sue, gives you a lot of information about showing the elements of a tort action in Louisiana, what types of claims you would file a tort action about, how you might be able to try to get a lawyer to represent you, how to pay fees, and how to file the correct documents.

In addition to filing your claim under federal law, Louisiana also allows you to challenge decisions from the Administrative Remedy Procedures (ARP) in state courts under *state law*.<sup>20</sup> As discussed above, it is important to attempt all administrative remedies before filing a claim under federal or state court. State courts will review all injury or damage claims and decide the issue for themselves, even though the claim has already been decided through the ARP. This only applies, however, to “delictual” claims (meaning civil law claims like assault, battery, or other claims for “injury or damages”).<sup>21</sup> See Chapter 9 of the *Louisiana State Supplement*, Section C, for more detailed information on when and how state courts can review your ARP claim.

### C. CHOOSING A COURT

This Section will give you information about choosing a court for claims other than state court tort claims, which are discussed above. If you are deciding to bring a federal claim about your prison conditions, it is very important that you read Chapter 14 of the main *JLM*, “The Prison Litigation Reform Act.” The Prison Litigation Reform Act (“PLRA”), makes it harder for prisoners to take their complaints about prison conditions to federal court. Like the LPLRA, the PLRA also gives harsh consequences if you bring your claim incorrectly. Though the PLRA can be used only in federal court cases, Louisiana’s LPLRA is very similar to the PLRA, and is based on the PLRA. The LPLRA will be explained in detail below in Part D of this Chapter.

For federal court claims, the PLRA requires you pay the full court filing fee even if you proceed *in forma pauperis*, which means as a poor person. (The topic of filing a claim as a poor person will be explained in more detail in Part D, Section 3 of this Chapter.) If you file as a poor person, however, your fees will be taken in installments from your prison account. This means instead of having to pay all the fees at one time, you can pay a little at a time. But, if you file a federal claim *in forma pauperis* (as a poor person), you risk receiving a strike under the “three strikes” provision (section) of the PLRA. The three strikes provision states that if you have three cases dismissed as not having any serious value, malicious, or failing to state a valid legal claim, you will have to pay the full filing fee in whole (not a little at a time) to pursue your next claim. If you receive three strikes, you will not be able to use the *in forma pauperis* procedure (option). Moreover, if the court finds you have filed a lawsuit for ill-intent or harassing purposes, you may lose any good-time credit you have earned, which is credit for good behavior in prison that counts toward shortening your sentence.<sup>22</sup>

The PLRA has the same “exhaustion” requirement as the one discussed above in the LPLRA. You must use the ARP process before you bring a claim in federal court or your claim will be thrown out. Remember, these are only a few of the restrictions imposed by the PLRA. Therefore, you should read Chapter 14 of the main *JLM* before you file any federal claim.

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<sup>19</sup> LA. CIV. CODE ANN. art. 2315 (2017).

<sup>20</sup> LA. CONST. art. V, § 16(A) (“[A] district court shall have original jurisdiction of all civil and criminal matters.”); LA. REV. STAT. § 15:1177 (2017) (“Any offender who is aggrieved by an adverse decision . . . pursuant to any administrative remedy procedures under this Part, may . . . seek judicial review.”).

<sup>21</sup> LA. REV. STAT. § 15:1177 (2017) (stating that judicial review limitations only apply to “delictual actions for injury or damages”).

<sup>22</sup> 28 U.S.C. § 1932 (2012).

## 1. Section 1983

A federal law, 42 U.S.C. § 1983 (“Section 1983”), allows you to sue state and city prison or jail officials and guards if they violate (take away from you) your federal constitutional rights (like your right to adequate medical care, to be free from assault, and to have access to the courts and to legal materials). You **cannot** use § 1983 to attack your conviction or sentence. For more information on Section 1983, please read Chapter 16 of the main *JLM*, especially if you want to use Section 1983 to bring your lawsuit.

When you file a Section 1983 complaint, you must give a detailed description of the incident or practice that you want remedied. If the problem affects many prisoners, you might also be able to bring your lawsuit as a class action. A class action is a suit brought on behalf of you and others who experience the same problem or have the same complaint.<sup>23</sup> You can also add any additional state claims to your federal cause of action if a state claim involves the same facts as the alleged federal claim.<sup>24</sup>

Section 1983 has a statute of limitations, which is the limit on the amount of time you have before your right to file a lawsuit disappears. Section 1983 claims use the state statute of limitations for personal injury suits in the state in which the court is located, which is one year in Louisiana.<sup>25</sup> The statute of limitations period begins to run when you find out about (or should have found out about) the injury that you are complaining about.

A federal judge who hears a § 1983 claim may order any one or more of the following remedies: (1) an injunction (an order to prison officials to stop denying you your rights or to take steps to allow you to exercise your rights); (2) money damages (which means that you get awarded money for your injury); or (3) a declaratory judgment (a statement by the court about the nature and limits of your rights made before they have been violated).

After you determine the district court in which you must file, you should write to the clerk of that district court asking for the forms and information you need. You can complete the filing of your Section 1983 lawsuit simply by mailing the appropriate documents to the clerk. Chapter 16 of the main *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law,” discusses Section 1983 suits in detail.

## 2. *Bivens* Actions<sup>26</sup> under 28 U.S.C. § 1331

*This is a broad introduction to Bivens actions, but this topic is discussed in much more detail in Chapter 16 of the main JLM. If you want to use a Bivens action to bring your lawsuit, please carefully read that Chapter in the main JLM.*

There is no statute similar to § 1983 allowing you to sue federal officials who deprive you of your federal rights. However, you can use what is called a “*Bivens* action” under 28 U.S.C. § 1331(a) to sue federal officials.<sup>27</sup> A *Bivens* action is similar to a § 1983 claim. Much of the information that applies to § 1983 claims also applies to *Bivens* actions. For example, just like a § 1983 action, you may use a *Bivens* action to complain about conditions or treatment violating your constitutional rights. The PLRA similarly requires that you exhaust all available administrative remedies before filing your *Bivens* action.

A *Bivens* action allows you to sue a federal officer who violated your rights. However, you can only sue a federal officer as an individual, but not as an official. This means that you can sue the officer as a

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<sup>23</sup> But keep in mind that you need a lawyer to file a class action. You cannot file one by yourself.

<sup>24</sup> See Part C(6)(b) of the main *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law,” for more information on supplementing your federal § 1983 case with state claims.

<sup>25</sup> LA. CIV. CODE ANN. art. 3492 (2017).

<sup>26</sup> For more information on *Bivens* actions, see Part E of Chapter 16 of the main *JLM*, “Using 42 U.S.C. § 1983 & 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law.”

<sup>27</sup> The claim comes from the case *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389, 91 S. Ct. 1999, 2001, 29 L. Ed. 2d 619, 622 (1971) (allowing a lawsuit against federal agents claiming a 4th Amendment violation).

person, but not as a government employee, and therefore your remedies are limited to what the individual can do to make you whole.<sup>28</sup> Additionally, you cannot bring a *Bivens* action against a federal agency or a private corporation that operates a federal prison facility.<sup>29</sup> If you are in a privately-owned prison facility, and want to sue the private corporation that owns the facility, you might have more success trying to bring a state tort claim. Federal courts also may not listen to your complaint if it sounds like you are suing for a harm that is relatively less serious, such as your personal items being taken from you.

If you bring a *Bivens* action, you must serve a copy of the summons and complaint on (1) the named defendants, (2) the U.S. Attorney for the district in which you bring your suit, and (3) the U.S. Attorney General in Washington, D.C.<sup>30</sup> If you seek injunctive or declaratory relief (meaning you are asking the court to stop something being done to you, but you are not asking for money), you may file your suit in the federal district where (1) any defendant resides, (2) where the events complained of occurred or are occurring, or (3) where you presently reside.<sup>31</sup> If you are suing under Section 1331 for only money damages, you need to serve the summons and complaint on (1) the U.S. Attorney for the district in which you bring your suit, (2) the U.S. Attorney General in Washington, D.C., and (3) the officer or employee you are suing.<sup>32</sup> To sue for damages, you must file in the federal district in which all the defendants reside or the district in which your claim arose (where the events you are complaining about occurred).<sup>33</sup> All service (delivery) must be by registered or certified mail.

### 3. Tort Suits in Federal Courts

If you are a federal prisoner and want to sue for a tort violation, you must sue using the Federal Tort Claims Act (“FTCA”)<sup>34</sup> instead of a *Bivens* action. The FTCA creates the procedures to sue the federal government for harm federal employees may have caused you or your property while they were doing their jobs. You must first send in a completed Form 95, “Claim for Damage, Injury, or Death,” and ask for damages from the federal agency whose employee allegedly caused the harm, which will normally be the Federal Bureau of Prisons.<sup>35</sup> Many FTCA cases go through the agency and are settled there. If your claim is denied, however, you may file suit in federal court. Remember, if you have not gone through the administrative remedies before going to federal court, the judge will dismiss your case.

### 4. Challenging Unconstitutional Prison Conditions Through the Department of Justice

The U.S. Department of Justice (“DOJ”) has authority under the Civil Rights of Institutionalized Persons Act to investigate state and local institutions for unconstitutional conditions.<sup>36</sup> This unit does not investigate federal institutions; you must use another agency like the Bureau of Prisons if you want to file

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<sup>28</sup> See *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994) (stating that a *Bivens* action “must be brought against the federal officers involved in their individual capacities.”). If you sue an officer in his “official capacity,” it is like suing the federal government, and under the concept of “sovereign immunity,” the federal government cannot be sued.

<sup>29</sup> See *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 486, 114 S. Ct. 996, 1006, 127 L. Ed. 2d 308, 324 (1994) (holding that *Bivens* suits cannot be brought against a federal agency); see also *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63, 122 S. Ct. 515, 517, 151 L. Ed. 2d 456, 461 (2001) (refusing to extend *Bivens* to allow recovery against a private company operating a halfway house under contract with the Federal Bureau of Prisons).

<sup>30</sup> Fed. R. Civ. P. 4(i).

<sup>31</sup> 28 U.S.C. § 1391(e) (2012).

<sup>32</sup> Fed. R. Civ. P. 4(i)(3).

<sup>33</sup> Fed. R. Civ. P. 4(k); LA. REV. STAT. § 13:3201(A)(4) (2017).

<sup>34</sup> Federal Tort Claims Act, 28 U.S.C. § 1346(b) (2012).

<sup>35</sup> You can get this form by writing to the clerk of the federal district court in which you plan to file your action. See U.S. Dep’t. of Justice Civil Division Forms—Form SF 95, available at <http://www.justice.gov/forms/dojform.php> (last visited Dec. 7, 2016).

<sup>36</sup> 42 U.S.C. § 1997 (2012). Some federal courts in New York have held that, under the PLRA, prisoners must exhaust the DOJ’s disability complaint procedure in addition to their internal prison grievance procedure before filing a disability-related complaint in federal court. Other courts have disagreed. For more information about whether your complaint would qualify as an “administrative remedy” under the PLRA, read Chapter 14, Part E, Section 1 of the main *JLM*.



a complaint about a federal prison.<sup>37</sup> The DOJ will only investigate allegations of systemic abuse—problems experienced by many prisoners. If you think your prison suffers from widespread constitutional abuses, you might consider writing to the DOJ. The DOJ can neither provide individual relief, nor can it bring a claim regarding your criminal sentence. For these matters, you should contact an attorney.<sup>38</sup>

The Special Litigation Section enforces federal civil rights statutes in four major areas: (1) conditions of institutional confinement (if the conditions you are being confined in are unlawful); (2) law enforcement misconduct; (3) access to reproductive health facilities and places of religious worship and (4) protection of institutionalized persons' religious exercise rights (if you are being unlawfully barred from practicing your religion).<sup>39</sup> The DOJ receives a large number of claims every year and cannot investigate every claim. The DOJ also takes a long time to investigate, so it is important to be patient if you do bring a claim.

If you write to the DOJ, try to be as specific and clear as possible. Your letter should include your name, prisoner ID number, race, the length of your sentence and how much of your sentence you have served, and a description of what happened or the condition you believe to be unconstitutional. When you talk about what happened, be sure to include all relevant information, including how many times the abuse happened, the names and races of the people involved, and whether the abuse has happened to other prisoners. If you know of others who have had similar experiences, encourage them to write letters too. Send the letter to:

Special Litigation Section  
U.S. Department of Justice, Civil Rights Division  
950 Pennsylvania Avenue NW  
Patrick Henry Building, Room 5028  
Washington, D.C. 20530  
Telephone: (877) 218-5228; (202) 514-6255;  
Fax: (202) 514-0212; (202) 514-6273

If you are disabled and filing a complaint under the Americans with Disabilities Act, you must write to a different division of the DOJ. Chapter 28 of the main *JLM*, titled "Rights of Prisoners with Disabilities," will help you file this complaint.

## D. THE LOUISIANA PRISON LITIGATION REFORM ACT

The Louisiana Prison Litigation Reform Act ("LPLRA")<sup>40</sup> is similar to the Federal Prison Litigation Act, but applies to state law. The Federal Prison Litigation Reform Act is discussed in detail in Chapter 14 of the main *JLM*. It is important to understand the LPLRA in detail before taking a complaint to state court. The LPLRA was intended to make it harder for prisoners to file lawsuits.<sup>41</sup>

### 1. When the Louisiana Prison Litigation Reform Act Applies

The LPLRA applies to any "civil action with respect to prison conditions," including any civil proceeding with respect to the conditions of confinement or effects of actions by government officials on the lives of prisoners.<sup>42</sup> These restrictions do *not* apply to any appeals or challenges to a guilty verdict,

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<sup>37</sup> For more information, see Federal Bureau of Prisons, *available at* <http://www.bop.gov> (last visited Apr. 1, 2014).

<sup>38</sup> See United States Dep't. of Justice, *available at* <https://www.justice.gov/crt/filing-complaint> (last visited Oct. 11, 2017).

<sup>39</sup> For a summary of the Special Litigation Section's work, see U.S. Dep't. of Justice Civil Rights Division, *available at* <https://www.justice.gov/crt/special-litigation-section> (last visited Sept. 3, 2017).

<sup>40</sup> LA. REV. STAT. ANN. §§ 15:1181–1191 (2017).

<sup>41</sup> Rhone v. Ward, 45-008, p. 5 (La. App. 2 Cir. 2/3/2010), 31 So. 3d 591, 595, *writ denied*, 2010-0474 (La. 4/30/10); 34 So. 3d 291.

<sup>42</sup> LA. REV. STAT. ANN. § 15:1181 (2017); *McAlister v. Oilfield Instrumentation U.S.A., Inc.*, 09-1472, p. 1 (La. App. 3 Cir. 5/5/2010), 2010 WL 1780298, at \*1 (holding that the LPLRA does not apply to a prisoner suing a private company about wages he received for work performed while he was in prison); *Frederick v. Ieyoub*, 99-0616, p. 8 (La. App. 1 Cir.

including habeas corpus proceedings that challenge the *reason* or *length* of imprisonment.<sup>43</sup> For the LPLRA, “prison” means any state or local jail, prison, or any other correctional facility that imprisons or detains juveniles or adults who are accused of, convicted of, sentenced for, or adjudicated delinquent (a youth who has been found guilty by a judge of committing a delinquent act) for violating criminal law.<sup>44</sup> In other words, if you are imprisoned or detained for anything connected to criminal law, the LPLRA will apply to you. The LPLRA applies to suits in state court even if they are under federal laws, including Section 1983 claims such as that are discussed above.<sup>45</sup> The status of being a “prisoner” is determined at the time that the incident happened about which you brought your claim.<sup>46</sup>

## 2. An Overview of the LPLRA

Because of the strict rules of the LPLRA, it is important to be careful when preparing your claim. Under the LPLRA, you are not allowed to assert (make) a claim about emotional or mental injury unless you can also show physical injury.<sup>47</sup> The court can dismiss your complaint if it decides that your “action is frivolous, is malicious, fails to state a cause of action, seeks monetary relief from a defendant who is immune from such relief, or fails to state a claim upon which relief can be granted.”<sup>48</sup> If these conditions are met, the court can dismiss your suit even if you have pursued (used) all claims and remedies as fully as possible in your original court or jurisdiction.<sup>49</sup> In other words, you need to clearly explain the legal basis for your claim and communicate why it is a serious claim, without sounding overly angry or hateful. If you ask for money damages, you must make sure the person you request them from is not immune (can pay). A court may also take away earned good-time credit (credit for good behavior in prison that counts toward shortening your sentence) if it finds that your claim was filed for a malicious purpose, to harass the defendant, or if you say things that are false or provide false evidence or information.<sup>50</sup> Please read Chapter 10 of the *Louisiana State Supplement* on Tort Actions for more information on this topic.

The LPLRA lists the exhaustion requirements for completing the ARP before filing a claim. Remember that the defendant has the burden to prove with evidence that you have not exhausted administrative remedies.<sup>51</sup> You should not have to prove that you exhausted administrative remedies when bringing your claim. However, you should still always keep careful records of your ARP proceedings in case you need to prove that you have exhausted administrative remedies.

Under the LPLRA, any defendant has the option not to reply to your civil action.<sup>52</sup> If a defendant does not reply, it does not mean they are admitting wrongdoing. You cannot receive relief if the defendant has not answered. However, if the court thinks you have a reasonable chance of winning your suit, the court can force the defendant to reply.<sup>53</sup>

Finally, you should be prepared for the fact that you may not be able to physically be present at pretrial proceedings. The LPLRA requires the court to conduct these hearings by telephone, video conference, or other technology.<sup>54</sup> Hearings may also take place at the facility where you are being held.<sup>55</sup>

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5/12/2000); 762 So. 2d 144, 149, *writ denied*, 2000-1811 (La. 4/12/2001), 789 So. 2d 581 (holding that the LPLRA does not apply to a challenge to parole provisions because this is about the *length* of confinement, and so the plaintiff could not get a “strike” for his complaint being dismissed).

<sup>43</sup> LA. REV. STAT. ANN. § 15:1181 (2017).

<sup>44</sup> LA. REV. STAT. ANN. § 15:1181(5) (2017).

<sup>45</sup> LA. REV. STAT. ANN. § 15:1191 (2017).

<sup>46</sup> LA. REV. STAT. ANN. § 15:1181(6) (2017).

<sup>47</sup> LA. REV. STAT. ANN. § 15:1184(E) (2017).

<sup>48</sup> LA. REV. STAT. ANN. § 15:1184(B) (2017).

<sup>49</sup> LA. REV. STAT. ANN. § 15:1184(B) (2017).

<sup>50</sup> LA. REV. STAT. ANN. § 15:1190 (2017); *Rebaldo v. Jenkins*, 660 F. Supp. 2d 755, 762 (E.D. La. 2009) (A Plaintiff attached records to his complaint that were not enough to demonstrate exhaustion, but this was not enough to prove that exhaustion did not occur.).

<sup>51</sup> LA. REV. STAT. ANN. § 15:1184(B) (2017).

<sup>52</sup> LA. REV. STAT. ANN. § 15:1184(C) (2017).

<sup>53</sup> LA. REV. STAT. ANN. § 15:1184(C) (2017).

<sup>54</sup> LA. REV. STAT. ANN. § 15:1184(D) (2017).

<sup>55</sup> LA. REV. STAT. ANN. § 15:1184(D) (2017).

If an attorney represents you in your civil suit, the LPLRA also limits the amount of attorney fees that you may be awarded. Some of the attorney fees may be taken from any money damages that you win.<sup>56</sup>

### 3. *In Forma Pauperis*—Filing Your Suit as a Poor Person

Under the LPLRA, you are allowed to file your suit *in forma pauperis*. This means that you are filing your suit as a poor person, so there are changes to when you have to pay your fees. Instead of having to pay your entire fee before you can file the case, you will be able to pay your filing fee gradually.

If you want to file your suit *in forma pauperis*, you need to submit a certified copy of the trust fund account statement or equivalent (whatever paperwork your facility gives you documenting how much money you have) for the six-month period before you bring your action.<sup>57</sup> If you were at different facilities in the past six months, you have to try to get this paperwork from each facility.<sup>58</sup>

If you are successful in establishing your *in forma pauperis* status, the court will not require you to pay your entire filing fee before bringing your action. Instead, the court will take either 20 percent from the average monthly deposits to your account or the average monthly balance in your account for the six months before the filing—whichever is more.<sup>59</sup> Afterwards, you will have to pay 20 percent of each month's income towards fees. However, you will not have to pay more than the correct amount of fees in the statute.<sup>60</sup>

If you proceed *in forma pauperis*, all of your proceedings will be automatically “stayed” (stopped) until all of the money is collected for the fees.<sup>61</sup> You will not be allowed to take any official action about the claim until all of the money is collected.<sup>62</sup> This is true even if more money is added to your fee while you are saving up. If the full fees are not paid in three years, your suit will be dismissed “without prejudice.” This means that you will not lose any rights or privileges if you try to file your claim in the future, and it has no effect on what the court thinks about your claim.<sup>63</sup> If this happens and you believe that you *have* paid all your fees correctly and there was a mistake, you have 30 days to appeal this decision.<sup>64</sup>

There is one important exception to this rule about staying. If you believe that you are in immediate danger of serious physical injury and you are only seeking injunctive relief, then the automatic stay will not apply.<sup>65</sup> Injunctive relief means that you want the court to order that something be stopped to avoid this danger. If you are seeking any money, this exception will not apply. If you believe you are in immediate danger of serious physical injury, you should make this very clear so that the automatic stay will not apply. The court will likely look at whether this danger existed at the time you filed the complaint.<sup>66</sup>

### 4. The Three Strikes Rule

Another limitation that the LPLRA puts on your ability to file suits is the three strikes rule. Remember that the court will dismiss your action or appeal if it was “frivolous, was malicious, failed to state a cause of action, or failed to state a claim upon which relief may be granted.”<sup>67</sup> If you have three or

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<sup>56</sup> LA. REV. STAT. ANN. § 15:1185(B) (2017).

<sup>57</sup> LA. REV. STAT. ANN. § 15:1186(A)(1) (2017); *Rhone v. Ward*, 45,008, p. 1 (La. App. 2 Cir. 2/3/10); 31 So. 3d 591, 593, *writ denied*, 2010-0474 (La. 4/30/10); 34 So. 3d 291. (rejecting claims that these “stays” violate the constitution).

<sup>58</sup> LA. REV. STAT. ANN. § 15:1186(A)(1) (2017).

<sup>59</sup> LA. REV. STAT. ANN. § 15:1186(A)(2) (2017).

<sup>60</sup> LA. REV. STAT. ANN. § 15:1186(A)(2) (2017).

<sup>61</sup> LA. REV. STAT. ANN. § 15:1186(B)(2)(a) (2017).

<sup>62</sup> LA. REV. STAT. ANN. § 15:1186(B)(2)(a) (2017).

<sup>63</sup> LA. REV. STAT. ANN. § 15:1186(B)(2)(c) (2017).

<sup>64</sup> LA. REV. STAT. ANN. § 15:1186(B)(2)(c) (2017).

<sup>65</sup> LA. REV. STAT. ANN. § 15:1186(B)(2)(d) (2017).

<sup>66</sup> *Baños v. O'Guin*, 144 F.3d 883, 884 (5th Cir. 1998).

<sup>67</sup> *Baños v. O'Guin*, 144 F. 3d 883, n.6 (5th Cir. 1998).

more actions or appeals dismissed on one of these grounds, you will no longer be allowed to bring a civil action or appeal a judgment *in forma pauperis*.<sup>68</sup> At least one court has counted a “strike” when a prisoner failed to exhaust his administrative remedies.<sup>69</sup> Remember that this rule only applies if your case is dismissed for *these specific reasons*. If it is dismissed for another reason, such as withdrawing your complaint, you will not get a strike. If you have three dismissals but they are not final yet, the court may stop all of your proceedings and wait until the dismissals are final. Just like above, the court will make an exception to the three strikes rule if you are in immediate danger of serious physical injury. This is another reason why it is so important to make sure that your facts amount to a violation of law. Just your general feeling that you have been mistreated may get you strikes.

## 5. Relief Available Under The LPLRA

The LPLRA seriously limits any relief or remedy that you can receive in any case that the LPLRA applies to. The relief in any civil action cannot go further than necessary to correct the state right violation of the particular prisoners who are the plaintiffs in the case.<sup>70</sup> The relief must be “narrowly drawn” and be the “least intrusive means necessary.”<sup>71</sup> The LPLRA also orders the court to seriously weigh any public safety issues or negative impact on the operation of the criminal justice system that might result from the relief.<sup>72</sup> The relief can be a temporary restraining order or an injunction, and the injunction must expire after 90 days.<sup>73</sup> No prisoner release order can result from a civil action regarding conditions in prison unless a previous order for less intrusive relief failed to remedy (fix) the problem.<sup>74</sup> However, private settlement agreements between two parties do not have to comply with these limitations. This is true as long as these settlements are not subject to court enforcement, other than the reinstatement of the original civil proceeding.<sup>75</sup>

Finally, under the LPLRA, if you have any outstanding restitution orders, any damages that you win will be paid toward this restitution. You will get what is leftover. If you win damages, the court is supposed to make “reasonable efforts” to notify any victims of your crime.<sup>76</sup> This is an important thing to consider before filing a claim if you do have an outstanding restitution order.

## E. CONCLUSION

This Chapter has provided you with an introduction to how to protect your rights while in prison. It has explained the difference between an ARP claim and a tort claim, and how important it is to exhaust your internal grievance procedure before filing a claim in court. It has also given you an overview of the Louisiana Prison Litigation Reform Act and explained how this Act’s rules and restrictions may apply to your claim.

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<sup>68</sup> LA. REV. STAT. ANN. § 15:1187 (2017); *Lightfoot v. Stalder*, 2000-1120, p. 7 (La. App. 1 Cir. 6/22/01); 808 So. 2d 710, 716, *writ denied*, 2001-2295 (La. 8/30/02); 823 So. 2d 957. In this case, a prisoner brought a claim of cruel and unusual punishment because a corrections officer, who the plaintiff called “retarded,” was taking pills from a bottle and falling asleep. This placed the prisoners in “grave danger.” The court affirmed a strike for this claim because it said that the claim was “frivolous” and failed to state a claim.

<sup>69</sup> *Rochon v. Young*, 2008-1349, p. 4 (La. App. 1 Cir. 2/13/09); 6 So. 3d 890, 892, *writ denied sub nom.*, *Rochon v. Louisiana State Dep’t. of Corr.*, 2009-0745 (La. 1/29/10); 25 So. 3d 824, *and cert. dismissed*, 130 S. Ct. 3325 (2010).

<sup>70</sup> LA. REV. STAT. ANN. § 15:1182(A) (2017).

<sup>71</sup> LA. REV. STAT. ANN. § 15:1182(A) (2017).

<sup>72</sup> LA. REV. STAT. ANN. § 15:1182(A) (2017).

<sup>73</sup> LA. REV. STAT. ANN. § 15:1182(B) (2017).

<sup>74</sup> LA. REV. STAT. ANN. § 15:1182(C) (2017).

<sup>75</sup> LA. REV. STAT. ANN. § 15:1182(F) (2017).

<sup>76</sup> LA. REV. STAT. ANN. § 15:1189 (2017).

# CHAPTER 7: YOUR RIGHT TO BE FREE FROM ASSAULT BY PRISON GUARDS AND OTHER PRISONERS\*

## A. INTRODUCTION

If a guard or another prisoner attacked, raped, or assaulted you in some other way, this Chapter can help you figure out whether you can sue and how to do it. If you decide to sue, you must bring a *civil* law claim. You cannot bring *criminal* charges against your attacker because only the government can do that. You can bring a civil suit before the government criminally charges your attacker and even if the government never charges your attacker.

Two types of law protect you from assault while you are in prison: (1) Louisiana state law and (2) the U.S. Constitution. You can make a state law claim (saying that an assault violated state law) or a federal constitutional claim (saying that an assault violated your constitutional rights). This Chapter explains when you may use these laws. For more information about your constitutional rights, please read Chapter 24 of the main *JLM*, “Your Right to Be Free from Assault by Prison Guards and Other Prisoners.”

## B. YOUR RIGHT TO BE FREE FROM ASSAULT

This Part of the Chapter explains what law you can use to sue if someone attacked or threatened you. Section One explains how you can use Louisiana law to sue another prisoner or a prison official for assault or battery. Section Two explains how you can use Louisiana law to sue a prison official, a prison, or the state of Louisiana for negligence if another prisoner harms you. Finally, Section Three explains how you can sue prison officials under the Eighth Amendment of the Constitution if a prison official or another prisoner harms you.

### 1. Assault and Battery under Louisiana State Law

Louisiana state law protects you from two types of assaults: (1) “battery” (a physical attack)<sup>1</sup> and (2) “assault” (an act that makes you afraid that you will be physically attacked, such as a threat, verbal abuse, or harassment).<sup>2</sup> Both are “intentional torts.”<sup>3</sup>

You can sue for battery only if someone touched you on purpose in a way that harmed you.<sup>4</sup> To make a battery claim, you must prove three things: (1) “act,” (2) “intent,” and (3) “contact.” “Act” means your attacker did something—for example, he used his own hand to hit you or he pulled a trigger. “Intent” means your attacker *wanted* to touch you in a harmful or offensive way or *believed* that his act was going to cause you to be touched in a harmful or offensive way.<sup>5</sup> Your attacker’s intent does not have to be

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\* This Supplement Chapter was written by Michelle Luo.

<sup>1</sup> Battery is “[t]he nonconsensual touching of, or use of force against, the body of another with the intent to cause harmful or offensive contact.” Black’s Law Dictionary (10th ed., 2014).

<sup>2</sup> Assault is “[t]he threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery.” Black’s Law Dictionary (10th ed., 2014).

<sup>3</sup> A tort is “[a] breach of a duty that the law imposes on persons who stand in a particular relation to one another.” An intentional tort is “[a] tort committed by someone acting with general or specific intent.” Black’s Law Dictionary (10th ed., 2014).

<sup>4</sup> LA. REV. STAT. ANN. § 14:33 (2017) (“Battery is the intentional use of force or violence upon the person of another; or the intentional administration of a poison or other noxious liquid or substance to another.”); Landry v. Bellanger, 2002-1443, p. 6 (La. 5/20/03); 851 So. 2d 943, 949 (“[B]attery is ‘[a] harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff to suffer such a contact . . . .’”) (quoting Caudle v. Betts, 512 So. 2d 389, 391 (La. 1987)).

<sup>5</sup> Caudle v. Betts, 512 So. 2d 389, 391 (La. 1987) (“The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm . . . . Rather it is an intent to bring about a result which will invade the interests of another in a way that the law forbids.”); Bazley v. Tortorich, 397 So. 2d 475, 481 (La. 1981) (“The meaning

malicious (evil). He must have wanted to *touch* you but it is not necessary that he wanted to *hurt* you.<sup>6</sup> “Contact” means your attacker touched you in a harmful or offensive way. You can prove contact even if your attacker did not cause you physical harm<sup>7</sup> and even if he did not touch you directly—for example, if he stabbed you or threw something at you.<sup>8</sup> Thus, battery means that your attacker *wanted* to and *did* touch you in a harmful or offensive way.

If your attacker did not touch you but instead made you *afraid* that you were going to be touched in a harmful or offensive way, you can sue him for assault.<sup>9</sup> To make an assault claim, you must prove three things: (1) “act,” (2) “intent,” and (3) that your attacker made you reasonably afraid that you were going to be touched in a harmful or offensive way.<sup>10</sup> For assault, “intent” means that your attacker wanted to make you afraid that you were going to be touched in a harmful or offensive way.<sup>11</sup> A verbal threat alone is not enough to be assault. But it may be assault if your attacker threatens to harm you *and* is able to harm you and makes you afraid that he will harm you.<sup>12</sup>

There are two important differences between assault and battery. First, for assault, you must prove that you were *afraid* that someone might touch you.<sup>13</sup> This is not a requirement for a battery claim.<sup>14</sup> For example, it is not assault if someone intentionally hit you while you were sleeping because

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of ‘intent’ is that the person who acts either (1) consciously desires the physical result of his act . . . or (2) knows that that result is substantially certain to follow from his conduct . . .”.

<sup>6</sup> Caudle v. Betts, 512 So. 2d 389, 391 (La. 1987) (finding defendant committed battery even though he gave plaintiff an electrical shock “as a practical joke”); Brungardt v. Summitt, 2008-0577, p. 11 (La. App. 4 Cir. 04/08/09); 7 So. 3d 879, 887 (“The defendant’s intention need not be malicious nor need it be an intention to inflict actual damage . . . . It is sufficient if the defendant intends to inflict either a harmful or offensive contact without the other’s consent.”) (internal citations omitted).

<sup>7</sup> Caudle v. Betts, 512 So. 2d 389, 391 (La. 1987) (stating that both “contacts that do actual physical harm” and “relatively trivial [contacts] which are merely offensive and insulting” meet the contact requirement).

<sup>8</sup> FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., LOUISIANA TORT LAW §§ 2–6(A) (2016) (“The contact may be with an inanimate object controlled or precipitated by the actor, such as the surgeon’s scalpel, a bullet, a car in which a person is sitting or even a thrown hamburger.”); Fricke v. Owens-Corning Fiberglas Corp., 571 So. 2d 130, 132 (La. 1990) (suggesting that exposure to harmful gases counts as a “contact” in battery); Saucier v. Belgard, 445 So. 2d 191, 194 (La. App. 3 Cir. 1984) (finding battery where defendant shot plaintiff three times).

<sup>9</sup> LA. REV. STAT. ANN. § 14:36 (2017) (“Assault is an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery.”).

<sup>10</sup> See RESTATEMENT (SECOND) OF TORTS § 19 (1965) (“In order that a contact be offensive to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted.”); see, e.g., Groff v. Sw. Beverage Co., 08-625, p. 6 (La. App. 3 Cir. 11/05/08); 997 So. 2d 782, 787–788 (finding that defendant did not make plaintiff reasonably afraid by yelling and cursing at him because defendant did not have a weapon or move toward him in a threatening way, they were separated by a desk, and three other people were in the room at the time); McVay v. Delchamps, Inc., 97-860, p. 5 (La. App. 5 Cir. 01/14/98); 707 So. 2d 90, 93 (finding that defendant made plaintiff reasonably afraid defendant was going to hurt her when he pointed a gun at her and her friend walking next to her, shot her friend, and made eye contact with her right after he shot her friend); Castiglione v. Galpin, 325 So. 2d 725, 726 (La. App. 4 Cir. 1976) (finding that plaintiff was reasonably afraid when defendant said to plaintiff, “I’ll get a gun and shoot you if you dare to close that water,” went inside, got a gun, and returned to his front porch, where he either pointed the gun at the plaintiff or sat with the gun on his lap).

<sup>11</sup> RESTATEMENT (SECOND) OF TORTS § 21 cmt. a (1965) (suggesting that for assault, “intent” means that your attacker wanted to cause “apprehension” of an imminent “harmful or offensive contact”).

<sup>12</sup> Groff v. Sw. Beverage Co., 08-625, p. 6 (La. App. 3 Cir. 11/05/08); 997 So. 2d 782, 787 (“Mere words do not constitute an assault . . . . Yet, a combination of threats, present ability to carry out the threats, and reasonable apprehension of harmful or offensive contact may suffice.”); Martin v. Bigner, 27694, p. 3 (La. App. 2 Cir. 12/06/95); 665 So. 2d 709, 712 (“Although words alone may not be sufficient to constitute an assault, threats coupled with the present ability to carry them out is sufficient when the victim is placed in reasonable apprehension of receiving an injury.”); Castiglione v. Galpin, 325 So. 2d 725, 726 (La. App. 4 Cir. 1976) (“Words alone may not be sufficient to constitute an assault; however, threats coupled with the present ability to carry out the threats are sufficient when one is placed in reasonable apprehension of receiving an injury.”).

<sup>13</sup> RESTATEMENT (SECOND) OF TORTS § 22 (1965) (“In tort, the plaintiff must be aware of the imminence of a harmful or offensive contact.”).

<sup>14</sup> FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., LOUISIANA TORT LAW 28 (2016) (“The victim need not be aware of the contact when it occurs.”).

you did not know that someone might touch you, but it is battery. Second, battery requires “contact” but assault does not. For example, if someone tried to hit you but missed, it is assault if you were afraid he was going to touch you, but it is not battery.

Sometimes, you can sue for *both* assault and battery. For example, if you watched as someone hit you, it is assault and battery because you were afraid that he was going to hit you (assault) and he did hit you (battery).

It is hard to sue prison staff for assault and battery. Prison officials can touch you and use some force on you that would be illegal outside of prison.<sup>15</sup> Also, under Louisiana law, prison employees have “qualified immunity,” which means they generally cannot be sued, when performing “discretionary functions,” which are actions prison employees can choose to take but do not have to take.<sup>16</sup>

Also, while you may be able to sue an individual, you generally cannot sue the state of Louisiana or the Louisiana Department of Public Safety and Corrections for assault or battery because these institutions are “immune from liability,” meaning they cannot be sued for intentional tort lawsuits.<sup>17</sup>

## 2. Negligence under Louisiana State Law

If another prisoner attacked you and you believe that prison officials were partly responsible for the attack or did not protect you from it, you may sue the prison and/or the prison officials. If prison officials did not participate in the attack, you may not sue the officials for battery or assault. Instead, you can sue the officials for negligence,<sup>18</sup> claiming that they negligently allowed another prisoner to attack you.<sup>19</sup>

To claim that the official was negligent, you must prove three things: (1) “duty,” (2) “breach,” and

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<sup>15</sup> *Smith v. Dooley*, 591 F. Supp. 1157, 1168 (W.D. La. 1984) (“[J]ail officials may use necessary force to protect themselves and to enforce prison regulations.”); *Diamond v. Thompson*, 364 F. Supp. 659, 667 (M.D. Ala. 1973) (stating that prison officials may “use reasonable force to move inmates, maintain order, or ensure compliance with regulations”), *cited favorably in* *Williams v. Kelley*, 624 F.2d 695, 698 (5th Cir. 1980).

<sup>16</sup> LA. REV. STAT. ANN. § 9:2798.1(B) (2012) (waiving liability of public officials who are performing or failing to perform “policy-making or discretionary acts when such acts are within the course and scope of their lawful powers and duties”); *Easter v. Powell*, 467 F.3d 459, 462 (5th Cir. 2006) (“[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982)); *Royal v. Clark*, 447 F.2d 501, 501–502 (5th Cir. 1971) (“Federal courts will not interfere in the administration of prisons absent an abuse of the wide discretion allowed prison officials in maintaining order and discipline.”); *Jackson v. State Dep’t. of Corrs.*, 2000-2882, p. 9 (La. 5/15/01) 785 So. 2d 803, 809 (stating that prison officials have qualified immunity).

<sup>17</sup> *Edelman v. Jordan*, 415 U.S. 651, 662–663, 94 S. Ct. 1347, 1355, 39 L. Ed. 2d 662, 672 (1974) (holding that states are immune from lawsuits brought by citizens of that state in federal court); *Citrano v. Allen Corr. Ctr.*, 891 F. Supp. 312, 320 (W.D. La. 1995) (“The Eleventh Amendment bars suits for damages against a state in federal court unless the state waives its immunity.”); *Anderson v. Phelps*, 655 F. Supp. 560, 564 (M.D. La. 1985) (finding that the Louisiana Department of Public Safety and Corrections is immune from lawsuits because it is an agency of the state).

<sup>18</sup> Negligence means “[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregarding of others’ rights . . . . A tort grounded in this failure, usu. expressed in terms of the following elements: duty, breach of duty, causation, and damages.” *Black’s Law Dictionary* (9th ed., 2009); *see also* *Dobson v. La. Power and Light Co.*, 567 So. 2d 569, 574 (La. 1990) (defining negligence as “conduct which falls below the standard established by law for the protection of others against an unreasonable risk of harm”).

<sup>19</sup> *Barlow v. New Orleans*, 241 So. 2d 501, 504, 257 La. 91, 99 (La. 1970) (“It is the rule, apart from statutory requirements, that a sheriff or police officer owes a general duty to a prisoner to save him from harm and the officer is liable for the prisoner’s injury or death resulting from a violation of such duty by negligence or other acts.”). *See* Chapter 17 of the main *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions,” for more on negligence and negligent torts.

(3) “causation.”<sup>20</sup> “Duty” means that prison officials had a responsibility to prevent or stop the attack.<sup>21</sup> “Breach” means that the prison officials failed to act in accordance with their duty. “Causation” means that the breach of the prison officials’ duty to protect you directly caused your injury.<sup>22</sup> You also must have been harmed or injured (damaged). For more information about harm, injury, and damage, *see* Chapter 10, Section B(2)(d) of the *Louisiana State Supplement*, “The State’s Duty to Protect You and Your Property—Tort Actions.”

Louisiana follows the *Parker* rule, which is often called the “bad blood” rule. *Parker* says that you must prove two things in order to sue prison officials or prisons for negligence. First, you must prove that the officials knew or had reason to believe that you would be harmed. Second, you must prove that the officials did not reasonably try to prevent the harm.<sup>23</sup> Overcoming the burden of proof for the *Parker* rule is very difficult in Louisiana.<sup>24</sup>

<sup>20</sup> State *ex rel.* Jackson v. Phelps, 95-2294, p. 3 (La. 04/08/96); 672 So. 2d 665, 666–667 (“[P]laintiff must prove that the conduct in question was a cause-in-fact of the resulting harm, the defendant owed a duty of care to plaintiff, the requisite duty was breached by the defendant, and the risk of harm was within the scope of protection afforded by the duty breached.”); *see also* Scott v. State, 618 So. 2d 1053, 1059 (La. App. 1 Cir. 1993) (stating the same test).

<sup>21</sup> *See, e.g.,* State *ex rel.* Jackson v. Phelps, 95-2294, p. 3 (La. 04/08/96); 672 So. 2d 665, 667 (“[P]enal authorities have a duty to use reasonable care in preventing harm after they have reasonable cause to anticipate it.”); Barlow v. New Orleans, 241 So. 2d 501, 504, 257 La. 91, 99 (La. 1970) (stating “a sheriff or police officer owes a general duty to a prisoner to save him from harm”); Cotton v. City of Shreveport, 30,734, p. 5 (La. App. 2 Cir. 06/24/98); 715 So. 2d 651, 653–654 (finding that the city has a duty “to provide inmates who work in the jail with safe working conditions and equipment and to protect them from unreasonable risks of foreseeable harm”); Scott v. State, 618 So. 2d 1053, 1059 (La. App. 1 Cir. 1993) (“[P]rison authorities owe a duty to use reasonable care to protect inmates from harm and . . . this duty extends to protecting inmates from self-inflicted injury.”).

<sup>22</sup> *See, e.g.,* Anderson v. Phelps, 451 So. 2d 1284, 1285 (La. App. 1 Cir. 1984) (finding that defendants’ failure to post two security guards in each prison dormitory did not cause the prisoner’s injury because his attacker would have injured the prisoner regardless of how many guards were present).

<sup>23</sup> *Parker v. State*, 282 So. 2d 483, 486 (La. 1973) (“[I]n order to hold the penal authorities liable for an injury inflicted upon an inmate by another inmate, the authorities must know or have reason to anticipate that harm will ensue and fail to use reasonable care in preventing the harm.”), *followed in* State *ex rel.* Jackson v. Phelps, 95-2294, p. 3 (La. 04/08/96); 672 So. 2d 665, 667 (stating that whether penal authorities breached their duty to use reasonable care in preventing harm depends on whether they had reasonable cause to anticipate the harm); Harrison v. Natchitoches Parish Sheriff’s Dep’t., 04-0928, p. 4 (La. App. 3 Cir. 12/17/04); 896 So. 2d 101, 103 (finding there was no reasonable cause for penal authorities to anticipate harm to plaintiff); Brewer v. State, 618 So. 2d 991, 992 (La. App. 1 Cir. 1993) (finding that State was not liable for harm inflicted upon inmate despite previous violent encounter); Anderson v. Phelps, 451 So. 2d 1284, 1285 (La. App. 1 Cir. 1984) (concluding that the violation of a federal court order to post two security guards in each dormitory was not negligence *per se* (by itself)); Walden v. State, 430 So. 2d 1224, 1227 (La. App. 1 Cir. 1983) (finding that failure to follow prison policy did not violate legal duty to injured prisoner); Moore v. Foti, 440 So. 2d 530, 531–532 (La. App. 4 Cir. 1983) (finding there was no proof that the prison officer “knew or had reason to anticipate that harm would ensue to” prisoner because of an attack by a fellow prisoner over missing money); McGee v. State Dep’t. of Corr., 417 So. 2d 416, 418 (La. App. 1 Cir. 1982) (finding that the state had no reason to anticipate the harm because there was no evidence that officials knew of previous threats or confrontations between the two prisoners); Neathery v. State Dep’t. of Corr., 395 So. 2d 407, 410 (La. App. 3 Cir. 1981) (finding that prisoner failed to prove breach of legal duty by Department of Corrections or National Guard, despite complaints); Shields v. State Dep’t. of Corr., 380 So. 2d 123, 125 (La. App. 1 Cir. 1979) (finding that Department of Corrections was not negligent despite an inmate’s possession of acid thrown on plaintiff prisoner).

<sup>24</sup> *See, e.g.,* State *ex rel.* Jackson v. Phelps, 95-2294, pp. 4–5 (La. 4/8/96) 672 So. 2d 665, 667 (finding that the state was not liable for prisoner’s injuries when he was attacked by another prisoner because prison officials did not know that there was any hostility between the two prisoners before the attack); *Parker v. State*, 282 So. 2d 483, 487 (La. 1983) (finding prison officials were not negligent for failing to prevent one prisoner from attacking another, even though victim told them that he was afraid of attack, because such statements are common and officials had acted reasonably to protect him by holding a conference with prisoners and searching for weapons); Bonnet v. Lafayette Parish Sheriff, 08-905, pp. 6–8 (La. App. 3 Cir. 02/04/09); 2 So. 3d 1280, 1284–1285 (finding that sheriff’s department did not breach its duty to prevent prisoner from harming himself because he was placed in a medical holding cell and monitored every 15 minutes); Harrison v. Natchitoches Par. Sheriff’s Dep’t., 04-0928, p. 7 (La. App. 3 Cir. 12/17/04); 896 So. 2d 101, 105 (finding that sheriff’s department was not negligent for failing to prevent one prisoner from attacking another because prison officials did not know that the attacker tended to have unprovoked violent outbursts or that there was any hostility between the two prisoners before the attack); Brewer v. State Dep’t of Corr., 618 So. 2d 991, 992 (La. App. 1 Cir. 1993) (finding that prison officials and the Department of Corrections were not negligent when one prisoner seriously burned another because the victim did not prove that defendants probably knew or should have predicted the



You can sue a prison official, prison, or the state of Louisiana for negligence. If you sue a prison official for negligence, you should know that, like in assault and battery suits, prison officials have qualified immunity when performing discretionary functions, meaning they generally cannot be sued. However, unlike in suits involving assault and battery, which are intentional torts, the state of Louisiana is not immune from suits for negligence, as negligence is an ordinary tort.<sup>25</sup>

### 3. Eighth Amendment Protections from Harm

You can also sometimes sue prison officials under the Eighth Amendment of the Constitution if you are harmed in prison. You have a constitutional right to be free from assault under the Eighth Amendment,<sup>26</sup> which prohibits “cruel and unusual punishment.”<sup>27</sup> You can make an Eighth Amendment claim if a prison official used too much physical force against you.<sup>28</sup> This Section will briefly explain how to make an Eighth Amendment claim if a prison official or another prisoner harms you. If you want to bring an Eighth Amendment claim, you should also read Chapter 24 of the *JLM*, which covers in detail the Eighth Amendment protections from assault.

To make an Eighth Amendment claim, you must prove that the force used against you had two components (or parts):

- 1) A *subjective component*: prison officials acted with sufficiently culpable (guilty enough) state of mind at the time of the assault; and
- 2) An *objective component*: you were injured or put in great risk of serious injury.<sup>29</sup>

This Section explains how to prove both of these components in order to successfully show that an assault against you violated the Eighth Amendment. Subsection (a) of this Section explains how to prove the subjective component, and Subsection (b) explains how to prove the objective component.

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attack, even though his attacker had previously stabbed him in prison); *Anderson v. Phelps*, 451 So. 2d 1284, 1285 (La. App. 1 Cir. 1984) (finding prison officials were not negligent when one prisoner seriously burned another because victim had not stated he was afraid of attack, victim himself testified he did not know he was going to be attacked, and prison officials testified they had no reason to believe victim was in danger); *Walden v. State*, 430 So. 2d 1224, 1227 (La. App. 1 Cir. 1983) (finding that the state did not breach its duty to protect prisoner from another prisoner's attack, even though guards violated prison policy by giving the attacker access to the prisoner, because guards had no reason to believe that the attack would happen); *Moore v. Foti*, 440 So. 2d 530, 533 (La. App. 4 Cir. 1983) (finding that sheriff was not negligent for failing to stop prisoners from setting another prisoner on fire or for giving prisoners the liquid deodorant that they used to start the fire because sheriff could not have predicted that the attack would happen).

<sup>25</sup> LA. CONST. art. XII, § 10 (amended 1995) (“Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.”).

<sup>26</sup> This Chapter explains how the 8th Amendment's right to be free from cruel and unusual punishment can protect you from assault. But the 8th Amendment protects prisoners in other ways, too, such as from poor prison conditions like overcrowding and uncleanness. See Chapter 16 of the main *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law.” See also Chapter 23 of the main *JLM*, “Your Right to Adequate Medical Care,” for information about lack of proper medical care.

<sup>27</sup> U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

<sup>28</sup> *Cowart v. Erwin*, 837 F.3d 444, 452–453 (5th Cir. 2016) (“In evaluating excessive force claims under the Eighth Amendment, the ‘core judicial inquiry’ is ‘whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.’”); *Kron v. Tanner*, No. 10-518, 2010 U.S. Dist. LEXIS 58120, at \*8 (E.D. La. May 19, 2010), available at [https://www.gpo.gov/fdsys/pkg/USCOURTS-laed-2\\_10-cv-00518/pdf/USCOURTS-laed-2\\_10-cv-00518-2.pdf](https://www.gpo.gov/fdsys/pkg/USCOURTS-laed-2_10-cv-00518/pdf/USCOURTS-laed-2_10-cv-00518-2.pdf) (last visited Sept. 6, 2017) (“Without question, it is unconstitutional for a prison guard to use excessive force against an inmate. However, the United States Supreme Court has explained: ‘[W]henver prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.’ Only in the latter instance will the force be considered unconstitutionally excessive.”) (quoting *Hudson v. McMillian*, 503 U.S. 1, 6–7 (1992)); *Smith v. Dooley*, 591 F. Supp. 1157, 1167 (W.D. La. 1984) (stating that the 8th Amendment “guarantee[s] a state inmate’s right to be free from physical abuse”).

<sup>29</sup> *Hudson v. McMillian*, 503 U.S. 1, 8, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) (“[C]ourts considering a prisoner’s claim must ask both if ‘the officials act[ed] with a sufficiently culpable state of mind’ and if the alleged wrongdoing was objectively ‘harmful enough’ to establish a constitutional violation.”).

a. Subjective Component: Culpable State of Mind

To prove the subjective component of an Eighth Amendment claim, you must show that the prison official was *thinking* of harming you or *knew* that you were being harmed at the time you were assaulted. In other words, you must show the prison official's "state of mind." If a prison official hurt you, courts will use the *Hudson* "malicious and sadistic" standard,<sup>30</sup> whereas if another prisoner hurt you and prison officials did not prevent or stop the attack, courts will use the *Farmer* "deliberate indifference" standard.<sup>31</sup>

i. *When a Prison Official Harms You: The Hudson Standard*

If a prison official injured you and wanted to maliciously harm you, you can sue the official under the Eighth Amendment. The court will use the "malicious and sadistic" standard that the Supreme Court created in *Hudson v. McMillian*<sup>32</sup> to determine whether the official's force against you was so "excessive" (extreme) that it violated the Eighth Amendment. The Supreme Court recently looked at the *Hudson* standard again in *Wilkins v. Gaddy*.<sup>33</sup> Under *Hudson* and *Wilkins*, you must show that the official's force was not "a good-faith effort to maintain or restore discipline," but rather was used "maliciously and sadistically" to hurt you.<sup>34</sup> This means that you must show that the official did not use force to keep the prison safe and orderly, but rather, to evilly and cruelly hurt you.

To decide whether the prison official wanted to maliciously hurt you, which speaks to his "state of mind," courts will look at:

- 1) The seriousness of your injuries;
- 2) Whether the force was necessary under the circumstances, or why the official used force;<sup>35</sup>
- 3) The relationship between the need to use force and the amount of force that was actually used;
- 4) The seriousness of the threat that disorder in the prison would pose to the safety of prisoners, prison staff, and visitors as a prison official would reasonably see it;<sup>36</sup> and
- 5) Efforts made by prison guards to decrease the amount of force used.<sup>37</sup>

To win, you must prove that: (1) you suffered an injury; (2) your injury resulted directly and only from the use of clearly unnecessary force; and (3) the force was objectively unreasonable.<sup>38</sup> To bring an

<sup>30</sup> *Hudson v. McMillian*, 503 U.S. 1, 6–7, 112 S. Ct. 995, 998–999, 117 L. Ed. 2d 156, 165–166 (1992) ("Whenever prison officials stand accused of using excessive physical force" in violation "of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.").

<sup>31</sup> *Farmer v. Brennan*, 511 U.S. 825, 833–834, 114 S. Ct. 1970, 1976–1977, 128 L. Ed. 2d 811, 822–823 (1994).

<sup>32</sup> *Hudson v. McMillian*, 503 U.S. 1, 20–21, 112 S. Ct. 995, 1006, 117 L. Ed. 2d 156 (1992).

<sup>33</sup> *Wilkins v. Gaddy*, 559 U.S. 34, 37, 130 S. Ct. 1175, 1178, 175 L. Ed. 2d 995, 999 (2010) (per curiam).

<sup>34</sup> *Wilkins v. Gaddy*, 559 U.S. 34, 37, 130 S. Ct. 1175, 1178, 175 L. Ed. 2d 995, 999 (2010) (per curiam); *Hudson v. McMillian*, 503 U.S. 1, 6–7, 112 S. Ct. 995, 998–999, 117 L. Ed. 2d 156, 165–166 (1992); see, e.g., *Eason v. Holt*, 73 F.3d 600, 602 (5th Cir. 1996) (stating the *Hudson* standard).

<sup>35</sup> *Wilkins v. Gaddy*, 559 U.S. 34, 39, 130 S. Ct. 1175, 1179, 175 L. Ed. 2d 995, 1000 (2010) (per curiam) (the core focus is on "the nature of the force—specifically, whether it was nontrivial and 'was applied . . . maliciously and sadistically to cause harm.'" (quoting *Hudson v. McMillian*, 503 U.S. 1, 7, 112 S. Ct. 995, 998–999, 117 L. Ed. 2d 156, 165–166 (1992)); see also *Smith v. Dooley*, 591 F. Supp. 1157, 1168 (W.D. La. 1984) ("[W]hen the necessity for the application of force by the jail officials ceases, the continued use of harmful force can be a violation of the Eighth and Fourteenth Amendments.")).

<sup>36</sup> See, e.g., *Stroik v. Ponseti*, 35 F.3d 155, 158 (5th Cir. 1994) ("In answering [the question of whether Ponseti's use of force was 'objectively reasonable,'] the court must 'look at the totality of the circumstances, paying particular attention to 'whether the suspect pose[d] an immediate threat to the safety of the officers or others.'").

<sup>37</sup> *Hudson v. McMillian*, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) (describing factors to consider); see also *Cowart v. Erwin*, 837 F.3d 444, 453 (5th Cir. 2016) (quoting *Kitchen v. Dall. Cty.*, 759 F.3d 468, 477 (5th Cir. 2014)); *Williams v. Valenti*, 432 Fed. App'x. 298, 301 (5th Cir. 2011); *McCreary v. Massey*, 366 Fed. App'x. 516, 518 (5th Cir. 2010); *Moss v. Brown*, 409 Fed. App'x 732, 733 (5th Cir. 2010); *Baldwin v. Stalder*, 137 F.3d 836, 839 (5th Cir. 1998); *Bender v. Brumley*, 1 F.3d 271, 278 (5th Cir. 1993); *Hamilton v. Chaffin*, 506 F.2d 904, 909 (5th Cir. 1975); *Smith v. Dooley*, 591 F. Supp. 1157, 1167–1168 (W.D. La. 1984); *Le Blanc v. Foti*, 487 F. Supp. 272, 275 (E.D. La. 1980).

Eighth Amendment claim, you do not have to prove that you suffered a *serious* physical injury, but you must show that you suffered at least *some* physical injury<sup>39</sup> and that the official injured you as a result of the excessive use of force.<sup>40</sup>

Remember, “[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers, violates a prisoner’s constitutional rights.”<sup>41</sup> Even if a prison official used force against you, you probably will not win if the official used force in order to maintain or restore order in the prison.<sup>42</sup>

Nevertheless, some uses of force may be so excessive that they do violate your constitutional rights.<sup>43</sup> Also, even if it was necessary for a prison official to use force to keep the prison safe and orderly, once force is no longer necessary the continued use of harmful force may violate the Eighth Amendment.<sup>44</sup>

ii. *When Another Prisoner or Unsafe Conditions Harm You: The Farmer Standard*

<sup>38</sup> Anthony v. Martinez, 185 F. App’x. 360, 362 (5th Cir. 2006) (quoting Williams v. Bramer, 180 F.3d 699, 703, *clarified*, 186 F.3d 633, 634 (5th Cir. 1999)).

<sup>39</sup> Hudson v. McMillian, 503 U.S. 1, 9–10, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167–168 (1992) (stating that *de minimis* (small) uses of physical force generally do not violate the 8th Amendment); Williams v. Bramer, 180 F.3d 699, 703, *clarified*, 186 F.3d 633, 634 (5th Cir. 1999) (“[W]e do require a plaintiff asserting an excessive force claim to have ‘suffered at least some form of injury.’”) (quoting Jackson v. R.E. Culbertson, 984 F.2d 699, 700 (5th Cir. 1993) (*per curiam*)); Gomez v. Chandler, 163 F.3d 921, 924 (5th Cir. 1999) (“[T]he law of this Circuit is that to support an 8th Amendment excessive force claim a prisoner must have suffered from the excessive force a more than *de minimis* physical injury, but there is no categorical requirement that the physical injury be significant, serious, or more than minor.”); Jackson v. R.E. Culbertson, 984 F.2d 699, 700 (5th Cir. 1993) (*per curiam*) (“Although, [plaintiff] need not show a significant injury, he must have suffered at least some injury.”); Knight v. Caldwell, 970 F.2d 1430, 1432 (5th Cir. 1992) (stating that while a plaintiff does not need to prove significant injury to win an excessive force claim, he still must prove some injury, whether significant or insignificant); *c.f.* Wilkins v. Gaddy, 559 U.S. 34, 39–40, 130 S. Ct. 1175, 1179–1180, 175 L. Ed. 2d 995, 1000–1001 (2010) (*per curiam*) (holding that there is no minimum injury requirement, the core focus is on the nature of the force, and “the absence of ‘some arbitrary quantity of injury’ [does not] require[] automatic dismissal of an excessive force claim”); Thomas v. Comstock, 222 F. App’x. 439, 442 (5th Cir. 2007) (*per curiam*) (stating that *de minimis* force, including the use of chemical sprays, can support an excessive force claim, but “only if it is ‘repugnant to the conscience of mankind.’”) (quoting Hudson v. McMillian, 503 U.S. 1, 9–10, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167–168 (1992)); Brown v. Lippard, 472 F.3d 384, 386 (5th Cir. 2006) (“This Court has never directly held that injuries must reach beyond some arbitrary threshold to satisfy an excessive force claim.”); *see, e.g.*, Siglar v. Hightower, 112 F.3d 191, 193–194 (5th Cir. 1997) (holding that prisoner did not raise a valid 8th Amendment claim because prisoner’s bruised ear lasting for three days after the guard twisted it was a *de minimis* injury); Jackson v. R.E. Culbertson, 984 F.2d 699, 700 (5th Cir. 1993) (holding that prisoner did not raise a valid 8th Amendment claim because he suffered no injury when prison official sprayed him with a fire extinguisher).

<sup>40</sup> Anthony v. Martinez, 185 F. App’x. 360, 362 (5th Cir. 2006) (quoting Williams v. Bramer, 180 F.3d 699, 703, *clarified*, 186 F.3d 633, 634 (5th Cir. 1999)).

<sup>41</sup> Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973); *see also* Wilkins v. Gaddy, 559 U.S. 34, 37, 130 S. Ct. 1175, 1178, 175 L. Ed. 2d 995, 999 (2010) (*per curiam*) (“[N]ot ‘every malevolent touch by a prison guard gives rise to a federal cause of action.’”) (quoting Hudson v. McMillian, 503 U.S. 1, 9, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 165–166 (1992)); Le Blanc v. Foti, 487 F. Supp. 272, 275 (E.D. La. 1980) (“The management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, may require and justify the occasional use of a degree of intentional force.”) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033, 94 S. Ct. 462, 38 L. Ed. 2d 32 (1973)).

<sup>42</sup> *See, e.g.*, Davis v. Cannon, 91 F. App’x. 327, 328 (5th Cir. 2004) (*per curiam*) (holding that a correctional officer did not violate prisoner’s 8th Amendment rights by spraying him with a chemical agent because it was a good faith effort to maintain or restore discipline rather than a malicious or sadistic act); Jackson v. Cain, 864 F.2d 1235, 1243 (5th Cir. 1989) (citing Fulford v. King, 692 F.2d 11, 14–15 (5th Cir. 1982) (“[T]he use of handcuffs or other restraining devices constitute[s] a rational security measure and cannot be considered cruel and unusual punishment unless great discomfort is occasioned deliberately as punishment or mindlessly, with indifference to the prisoner’s humanity.”); Williams v. Kelley, 624 F.2d 695, 698 (5th Cir. 1980) (holding that police officers’ use of a chokehold on drunk and unruly arrestee which killed him did not violate his constitutional right because it was a good faith effort to maintain or restore discipline).

<sup>43</sup> *See, e.g.*, Anthony v. Martinez, 185 F. App’x. 360, 362 (5th Cir. 2006) (finding that there was legally sufficient evidentiary basis for a reasonable jury to find that prison official used excessive force when he punched, kneed, and repeatedly struck prisoner while prisoner was on the ground, handcuffed, and under prison guards’ control, and allegedly caused injuries including a bloody nose, seizures, migraine headaches, and nerve damage).

<sup>44</sup> Smith v. Dooley, 591 F. Supp. 1157, 1168 (W.D. La. 1984) (stating “when the necessity for the application of force by the jail officials ceases, the continued use of harmful force can be a violation of” the 8th Amendment).

The Eighth Amendment means prison officials need to keep you as safe as possible.<sup>45</sup> If officials know you might be hurt by another prisoner or by dangerous conditions, they need to try to protect you; if they do not, you can sue them under the Eighth Amendment.<sup>46</sup> The court will use the “deliberate indifference”<sup>47</sup> standard the Supreme Court created in *Farmer v. Brennan*.<sup>48</sup> *Farmer* says that a prison official is deliberately indifferent if he knew about a risk of harm to you but did not try to keep you safe.<sup>49</sup> *Even if you have not been harmed yet*, you can sue prison officials and claim that they ignored unsafe conditions or your risk of assault.<sup>50</sup>

To successfully make an Eighth Amendment claim that prison officials’ deliberate indifference let another prisoner or a prison official assault you, you must prove that:

- 1) There was a substantial risk to your safety; *and*
- 2) The prison officials knew about this risk to your safety; *and*
- 3) The prison officials did not try to prevent the assault *or* the prison officials did nothing to stop the assault *or* the prison officials tried to prevent or stop the assault, but they did not try as hard as they should have (that is, their attempts to prevent the assault were not reasonable).

(a) A Substantial Risk to Your Safety

You must show that there is or was a substantial risk of serious harm to your safety from another prisoner. Substantial risk means the risk has to be large enough that the court finds it important. This is one element (part) of the objective component of the *Farmer* test. For more information on this element, see Section B(3)(b)(ii) below.

(b) Prison Officials Knew about This Risk

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<sup>45</sup> See, e.g., *Adames v. Perez*, 331 F.3d 508, 512 (5th Cir. 2003) (“In particular, the [8th] Amendment imposes on prison officials a duty to protect prisoners from violence at the hands of other inmates.”).

<sup>46</sup> *Farmer v. Brennan*, 511 U.S. 825, 833–834, 114 S. Ct. 1970, 1976–1977, 128 L. Ed. 2d 811, 822–823 (1994) (stating officials have responsibility to protect prisoners from other prisoners and “having stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course”).

<sup>47</sup> Note that “deliberate indifference” is also the legal standard for 8th Amendment violations regarding medical care and general prison conditions, in addition to prisoner-on-prisoner assaults. See *Estelle v. Gamble*, 429 U.S. 97, 104–105, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) (“We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ . . . proscribed by the [8th] Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.”) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 875 (1976)).

<sup>48</sup> *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) (stating that in prison-conditions cases, a prison official can be found liable under the 8th Amendment only if he showed “deliberate indifference” to prisoner’s health or safety).

<sup>49</sup> *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (holding that a prison official can be found liable under the 8th Amendment only if he was subjectively aware of an excessive risk to the prisoner’s health or safety and ignored that risk); see also *Gobert v. Caldwell*, 463 F.3d 339, 346 (5th Cir. 2006) (restating the *Farmer* standard).

<sup>50</sup> *Farmer v. Brennan*, 511 U.S. 825, 843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994) (“[I]t does not matter . . . whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk.”); *Helling v. McKinney*, 509 U.S. 25, 34, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22, 32 (1993) (finding that the 8th Amendment also protects against “sufficiently imminent dangers” so that prisoners do not have to wait until they get hurt before they take action); *Gobert v. Caldwell*, 463 F.3d 339, 349 (5th Cir. 2006) (“[T]he risk must be cognizable, but the consequences of that risk need not yet have materialized, in order to define the time to begin to determine whether the defendant disregarded the risk.”); *Gates v. Cook*, 376 F.3d 323, 341 (5th Cir. 2004) (holding that an 8th-Amendment plaintiff did not have to prove that he was actually injured by exposure to raw sewage, only that such exposure posed a serious health risk).

You must also prove that prison officials knew that there was a substantial risk to your safety.<sup>51</sup> You cannot just say that prison officials *should have known* that there was a substantial risk to your safety.<sup>52</sup> But you do not have to prove that officials knew you were definitely going to be attacked. You only need to show that there was a substantial *risk* that you would be hurt *and* the officials knew about that risk.<sup>53</sup> You also do not have to show that officials knew who would assault or attack you.<sup>54</sup>

You can show that officials knew about this risk with direct evidence, with circumstantial evidence, or with both.<sup>55</sup> Circumstantial evidence means evidence that shows officials must have known about the risk. For example, evidence that the threat to your safety was obvious or “longstanding, pervasive, well-documented, or expressly noted by prison officials in the past” is circumstantial.<sup>56</sup> Most of the time, it is very difficult to prove that officials knew about a substantial risk to your safety.<sup>57</sup> Trying to make such claims can be an uphill battle. Prison officials will likely try to prove that they did not actually know about the facts showing you were in danger. They may also argue that even if they did know of some risk to your safety, they reasonably believed the risk was not significant or important.<sup>58</sup> So it is very important for you to present evidence showing that prison officials actually did know of the risk. Your own complaints indicating that you felt that you were in danger, without any other evidence, are probably not enough. This is because courts do not expect prison officials to believe every complaint a prisoner makes.

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<sup>51</sup> Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 825 (1994) (“[A] prison official cannot be found liable under the [8th] Amendment for denying an inmate humane conditions of confinement unless the official knows of . . . an excessive risk to inmate health or safety.”); *see also* Adames v. Perez, 331 F.3d 508, 512 (5th Cir. 2003) (“[I]n order to be deliberately indifferent, a prison official must be *subjectively aware* of the risk.”); Lawson v. Dallas Cty., 286 F.3d 257, 262 (5th Cir. 2002) (“[T]he plaintiff must establish that the jail officials were actually aware of the risk.”); Hare v. City of Corinth, 74 F.3d 633, 650 (5th Cir. 1996) (*en banc*) (holding that prison officials must be “be subjectively aware of this risk of serious injury”).

<sup>52</sup> Farmer v. Brennan, 511 U.S. 825, 838, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 826 (1994) (holding that “an official’s failure to alleviate a significant risk that he should have perceived but did not” cannot be the basis for an 8th Amendment claim); Domino v. Texas Dep’t. of Criminal Justice, 239 F.3d 752, 756 (5th Cir. 2001) (“[T]he ‘failure to alleviate a significant risk that [the prison official] should have perceived, but did not’ is insufficient to show deliberate indifference.”) (quoting Farmer v. Brennan, 511 U.S. 825, 838, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811, 826 (1994)); Hare v. City of Corinth, 74 F.3d 633, 650 (5th Cir. 1996) (*en banc*) (refusing to adopt “an objective measure of ‘should have been aware’”).

<sup>53</sup> Farmer v. Brennan, 511 U.S. 825, 843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994) (“The question under the [8th] Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial ‘risk of serious damage to his future health.’”) (quoting Helling v. McKinney, 509 U.S. 25, 35, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22, 33 (1993)).

<sup>54</sup> Farmer v. Brennan, 511 U.S. 825, 843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 829 (1994) (holding that prison officials may be liable even if they did not know that the “specific prisoner who eventually committed the assault” would likely attack the plaintiff).

<sup>55</sup> Johnson v. Johnson, 385 F.3d 503, 524 (5th Cir. 2004) (“The official’s knowledge of the risk can be proven through circumstantial evidence, such as by showing that the risk was so obvious that the official must have known about it.”); *see also* Farmer v. Brennan, 511 U.S. 825, 842, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 828 (1994) (stating that prisoners can use circumstantial evidence to prove that the official knew about the risk, and jurors and fact-finders can conclude that the official knew about the risk “from the very fact that the risk was obvious”); Adames v. Perez, 331 F.3d 508, 512 (5th Cir. 2003) (discussing that prisoners do not need to provide direct evidence that the official knew about the risk and that they can prove knowledge through circumstantial evidence such as showing that the risk was “longstanding” and “pervasive”).

<sup>56</sup> Farmer v. Brennan, 511 U.S. 825, 842–843, 114 S. Ct. 1970, 1981–1982, 128 L. Ed. 2d 811, 828–829 (1994); *see also* Easter v. Powell, 467 F.3d 459, 463 (5th Cir. 2006) (quoting Farmer v. Brennan, 511 U.S. 825, 842–843, 114 S. Ct. 1970, 1981–1982, 128 L. Ed. 2d 811, 828–829 (1994)).

<sup>57</sup> *See, e.g.,* Adames v. Perez, 331 F.3d 508, 512–513 (5th Cir. 2003) (holding that evidence showing that a few prisoners had previously escaped their cells and attacked others was not enough to prove prison officials’ deliberate indifference because those isolated instances fell short of a pervasive problem that officials must have known about).

<sup>58</sup> Johnson v. Johnson, 385 F.3d 503, 525 (5th Cir. 2004) (noting that prison officials tried to defend themselves by attempting to show that it was reasonable to believe, based on the information they had at the time, that there was no danger to the prisoner or that it was reasonable to disbelieve the prisoner’s repeated complaints of sexual abuse); *see also* Farmer v. Brennan, 511 U.S. 825, 844, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811, 830 (1994) (stating that prison officials can try to prove that they did not know of the underlying facts creating the risk or that they believed the risks to be insubstantial or nonexistent).

(c) Prison Officials Did Not Act Reasonably to Prevent or Stop Assault

Finally, you must prove that the prison official did not act *even though* he knew there was a substantial risk that you would be hurt.<sup>59</sup> The official must have chosen *on purpose* not to help you because he wanted you to be harmed.<sup>60</sup> If a prison official took reasonable steps to help you, but you were harmed anyway, you will likely lose because the court will find that the official did not act with deliberate indifference. Deliberate indifference means that the official knew about the risk but decided not to do anything about it.<sup>61</sup>

If your Eighth Amendment claim is about prison conditions, and not assault, you should know that most poor prison conditions do not violate the Eighth Amendment. The Eighth Amendment does not mean prisons have to be comfortable. Harsh prison conditions probably do not violate your constitutional rights.<sup>62</sup> However, prison conditions violate the Eighth Amendment if the conditions are “inhumane” (or cruel),<sup>63</sup> are much harsher than punishment for your charge should be,<sup>64</sup> or do not give you your basic needs.<sup>65</sup> You must get basic needs while in prison, like food, clothing, shelter, and medical care.<sup>66</sup>

(d) Examples of *Farmer* Deliberate Indifference Cases

<sup>59</sup> *Farmer v. Brennan*, 511 U.S. 825, 842, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 828 (1994) (holding that a prison official is liable under the 8th Amendment if he “acted or failed to act despite his knowledge of a substantial risk of serious harm”).

<sup>60</sup> *Mace v. City of Palestine*, 333 F.3d 621, 626 (5th Cir. 2003) (“Mere negligence or a failure to act reasonably is not enough. The officer must have the subjective intent to cause harm.”); *see also* *Bd. of Cty. Comm’rs v. Brown*, 520 U.S. 397, 407, 117 S. Ct. 1382, 1390, 137 L. Ed. 2d 626, 641 (1997) (stating that “[a] showing of simple or even heightened negligence will not suffice” to prove deliberate indifference); *Farmer v. Brennan*, 511 U.S. 825, 835–836, 114 S. Ct. 1970, 1978, 128 L. Ed. 2d 811, 824–825 (1994) (stating that “deliberate indifference describes a state of mind more blameworthy than negligence” and “acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk”); *Norton v. Dimazana*, 122 F.3d 286, 291 (5th Cir. 1997) (“‘Subjective recklessness,’ as used in the criminal law, is the appropriate test for deliberate indifference.”); *Southard v. Tex. Bd. of Criminal Justice*, 114 F.3d 539, 551 (5th Cir. 1997) (“[D]eliberate indifference’ is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action . . . . The ‘deliberate indifference’ standard permits courts to separate omissions that ‘amount to an intentional choice’ from those that are merely ‘unintentionally negligent oversight[s].’”) (quoting *Bd. of Cty. Comm’rs v. Brown*, 520 U.S. 397, 410, 117 S. Ct. 1382, 1391, 137 L. Ed. 2d 626, 643 (1997); *Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 756 (5th Cir. 1993) (citations omitted)).

<sup>61</sup> *Farmer v. Brennan*, 511 U.S. 825, 844, 114 S. Ct. 1970, 1982–1983, 128 L. Ed. 2d 811, 830 (1994) (stating there is no 8th Amendment violation if the official “responded reasonably to the risk, even if the harm ultimately was not averted”); *see also* *Walker v. Nunn*, 456 Fed. App’x 419, 422 (5th Cir. 2011) (quoting *Farmer v. Brennan*, 511 U.S. 825, 844, 114 S. Ct. 1970, 1982–1983, 128 L. Ed. 2d 811, 829 (1994)); *Adames v. Perez*, 331 F.3d 508, 512 (5th Cir. 2003) (“Prison officials are not . . . expected to prevent all inmate-on-inmate violence . . . . Prison officials can be held liable for their failure to protect an inmate only when they are deliberately indifferent to a substantial risk of serious harm.”).

<sup>62</sup> *Farmer v. Brennan*, 511 U.S. 825, 832–833, 114 S. Ct. 1970, 1976–1977, 128 L. Ed. 2d 811, 822–823 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 348–349, 101 S. Ct. 2392, 2399–2400, 69 L. Ed. 2d 59, 69–70 (1981)); *see, e.g.*, *Hernandez v. Velasquez*, 522 F.3d 556, 559–561 (5th Cir. 2008) (finding that lock-down in a small, shared cell for thirteen months with no exercise, which caused prisoner to suffer muscle atrophy and depression, did not violate prisoner’s 8th Amendment rights because prison officials never placed him at substantial risk of serious harm).

<sup>63</sup> *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 1976, 128 L. Ed. 2d 811, 822 (1994).

<sup>64</sup> *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59, 69 (1981).

<sup>65</sup> *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 347, 347, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59, 69 (1981)); *Hernandez v. Velasquez*, 522 F.3d 556, 560 (5th Cir. 2008); *Gates v. Cook*, 376 F.3d 323, 332 (5th Cir. 2004); *Davis v. Scott*, 157 F.3d 1003, 1006 (5th Cir. 1998); *see, e.g.*, *Bibbs v. Early*, 541 F.3d 267, 272 (5th Cir. 2008) (“[P]risoners have a right to protection from extreme cold.”) (quoting *Palmer v. Johnson*, 193 F.3d 346, 353 (5th Cir. 1999)).

<sup>66</sup> *Gates v. Cook*, 376 F.3d 323, 332 (5th Cir. 2004) (finding that prison officials were deliberately indifferent to the substantial risk of harm that filth, heat, pest infestations, and inadequate mental health care posed to Mississippi death row prisoners. The court said, “Prison officials must provide humane conditions of confinement; they must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measure to ensure the safety of the inmates.”).

This section describes how the United States Court of Appeals for the Fifth Circuit has decided certain deliberate indifference cases. This is the federal appeals court for Louisiana, so its decisions set the federal law in Louisiana.

In *Horton v. Cockrell*, the Fifth Circuit held that Horton, a prisoner, had an Eighth Amendment claim when prison officials failed to protect him from the attack of another prisoner named Jackson.<sup>67</sup> During a two-week period, Horton filed three grievances. He also made at least one oral complaint saying that Jackson had threatened him.<sup>68</sup> During the same two-week period, Jackson assaulted other prisoners and, according to Horton, tried to start a “race riot.”<sup>69</sup> The court stated that Jackson was an “obvious risk” to other prisoners because he was violent so often. The court said that the risk would be obvious even if Horton did not file complaints.<sup>70</sup> The court said that the risk was so obvious that prison officials must have been aware of the risk that Horton would be assaulted. Because officials were aware of the risk, the court said the officials’ failure to protect Horton was deliberate indifference.<sup>71</sup>

In other cases, however, the Fifth Circuit has denied Eighth Amendment claims. In *Adames v. Perez*, the court found that evidence showing a few other prisoners had previously escaped their cells and attacked others was not enough to prove that prison officials were aware of a risk of harm to the prisoner.<sup>72</sup> The court said the attacks were not a large problem at the prison, so the officials may not have known about them. Since the officials may not have known about them, the court did not find deliberate indifference.<sup>73</sup> In *Campbell v. Thomas*, the court held that officials had acted by moving the prisoner and his attacker to different cells, so the prisoner could not prove that officials’ failure to act to protect him was deliberate indifference.<sup>74</sup> In *Davis v. Tucker*, the prison official looked for more evidence to support the prisoner’s claim that other prisoners were going to assault him. The court held that the official was not deliberately indifferent because looking for more evidence was a reasonable response.<sup>75</sup>

In conclusion, to win an Eighth Amendment claim under the *Farmer* deliberate indifference standard, you must prove that prison officials (1) knew you were facing a substantial risk of serious harm and (2) ignored that risk by failing to take reasonable measures to stop another prisoner or prison official from attacking you.

#### b. Objective Component

To win an Eighth Amendment claim, you must prove both the subjective component and the objective component of the claim. This Subsection explains how to prove the objective component. If a prison official assaulted you, you must show that the official’s actions were so harmful that they violated

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<sup>67</sup> *Horton v. Cockrell*, 70 F.3d 397, 401 (5th Cir. 1995) (per curiam) (holding that the prisoner’s complaint should not have been dismissed as frivolous by the district court).

<sup>68</sup> *Horton v. Cockrell*, 70 F.3d 397, 400 (5th Cir. 1995) (per curiam).

<sup>69</sup> *Horton v. Cockrell*, 70 F.3d 397, 400 (5th Cir. 1995) (per curiam).

<sup>70</sup> *Horton v. Cockrell*, 70 F.3d 397, 401 (5th Cir. 1995) (per curiam).

<sup>71</sup> *Horton v. Cockrell*, 70 F.3d 397, 401 (5th Cir. 1995) (per curiam) ([T]he “factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.”) (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811, 828 (1994)).

<sup>72</sup> *Adames v. Perez*, 331 F.3d 508, 512–513 (5th Cir. 2003) (“It is difficult to see how a few isolated incidents of inmates escaping their cells could constitute a ‘longstanding and pervasive’ problem of which the prison officials must have been aware.”)

<sup>73</sup> *Adames v. Perez*, 331 F.3d 508, 514 (5th Cir. 2003) (“Adames may have demonstrated . . . that [prison officials] *should have* inferred . . . that inmates . . . might similarly escape from their cells. However, Adames failed to prove that [officials] *did* draw such an inference.”).

<sup>74</sup> *Campbell v. Thomas*, 98 Fed. App’x. 308, 309 (5th Cir. 2004) (finding that prison officials had not demonstrated deliberate indifference to prisoner’s verbal allegations of sexual abuse when they “responded to [the prisoner’s] verbal complaints by moving him to different cells and by moving an inmate [the prisoner] identified as his assailant.”).

<sup>75</sup> *Davis v. Tucker*, 322 Fed. App’x. 369, 371 (5th Cir. 2009) (finding that the prison official’s choice to obtain corroboration before taking the prisoner into protective custody demonstrated a “reasonable response to a potential risk.”).

your constitutional rights.<sup>76</sup> If there was a substantial risk of serious harm to you from another prisoner, you must show that a prison official's action or inaction put you at that risk. You have to show this whether or not you were actually assaulted.

i. *Seriousness of Harm from Prison Officials*

If you bring an Eighth Amendment claim against a prison official who assaulted you, you must prove the objective component that his actions were so harmful that they were “cruel and unusual punishment.”<sup>77</sup> However, you do not need to have been seriously injured to prove the objective component. In *Hudson v. McMillian*, the Supreme Court held you do not always need serious injury to prove the “objective component” of the Eighth Amendment.<sup>78</sup>

Instead, courts will consider both the seriousness of your injury *and* the intent and motivation of the prison official who caused your injury.<sup>79</sup> This means that when the prison official's actions are not made in good faith (they are meant to harm or are unnecessary), less serious injuries can satisfy the objective component. For example, in *Hudson*, the Court found that the prisoner's relatively minor injuries, which included bruises, swelling, loosened teeth, and a cracked dental plate, were enough to satisfy the objective component. These injuries were enough specifically because the prison official's attack was unnecessary and meant to harm.<sup>80</sup>

In *Flowers v. Phelps*, the Fifth Circuit applied this same rule. It said that you do not need a more serious injury for Eighth Amendment claims of excessive force.<sup>81</sup> In *Flowers*, a prisoner had a sprained ankle and mild scratches. The court said that these injuries were enough to meet the objective component. This is because the correction officers' attack was not necessary and was not provoked (or caused) by the prisoner.<sup>82</sup>

But in *Davis v. Cannon*, the Fifth Circuit said that the objective component of the Eighth Amendment was not met when prison officials threw a prisoner to the ground and sprayed him with chemicals.<sup>83</sup> The result in this case was different because the officials did not spray the prisoner just because they wanted to harm him. Instead, they sprayed him in a good faith effort to make the prisoner behave after he refused to obey orders.<sup>84</sup> Also, because the official who sprayed the prisoner did not use excessive force, the officials watching the attack were also not deliberately indifferent.<sup>85</sup>

ii. *Substantial Risk of Serious Harm from Other Prisoners*

You can bring an Eighth Amendment claim against prison officials for deliberately ignoring the risk that another prisoner will attack you. To win, you must prove that you actually faced a substantial risk of serious harm. You can even make a *Farmer* deliberate indifference claim if you were never injured

<sup>76</sup> *Hudson v. McMillian*, 503 U.S. 1, 8, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) (“[C]ourts considering a prisoner's claim must ask . . . if the alleged wrongdoing was objectively ‘harmful enough’ to establish a constitutional violation.”) (quoting *Wilson v. Seiter*, 501 U.S. 294, 303, 111 S. Ct. 2321, 2326, 111 L. Ed. 2d 271, 282 (1991)).

<sup>77</sup> U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

<sup>78</sup> *Hudson v. McMillian*, 503 U.S. 1, 4, 112 S. Ct. 995, 997, 117 L. Ed. 2d 156, 164 (1992) (holding that “the use of excessive physical force against a prisoner may constitute cruel and unusual punishment when the inmate does not suffer serious injury”).

<sup>79</sup> *Hudson v. McMillian*, 503 U.S. 1, 8–10, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 166–168 (1992) (holding that the injury must be considered against the context of the situation as well as the motivations and intent of the prison official who caused the injury).

<sup>80</sup> *Hudson v. McMillian*, 503 U.S. 1, 10, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 168 (1992).

<sup>81</sup> *Flowers v. Phelps*, 956 F.2d 488, 491 (5th Cir. 1992) (“[A] plaintiff who brings an excessive use of force claim need not show a significant injury in order to prove an Eighth Amendment violation.”), *vacated in part on other grounds*, 964 F.2d 400 (5th Cir. 1992).

<sup>82</sup> *Flowers v. Phelps*, 956 F.2d 488, 491 (5th Cir. 1992), *vacated in part on other grounds*, 964 F.2d 400 (5th Cir. 1992).

<sup>83</sup> *Davis v. Cannon*, 91 F. App'x. 327, 329 (5th Cir. 2004).

<sup>84</sup> *Davis v. Cannon*, 91 F. App'x. 327, 329 (5th Cir. 2004).

<sup>85</sup> *Davis v. Cannon*, 91 F. App'x. 327, 329 (5th Cir. 2004).



or attacked. But to do that, you have to show that prison conditions put you at substantial risk of serious harm and the conditions are sufficiently serious.<sup>86</sup>

It is important that you know that for a *Farmer* deliberate indifference claim, it does not matter how seriously you were injured. It does not even matter whether you were injured at all.<sup>87</sup> Instead, what matters is whether the conditions of your imprisonment created a *substantial* risk that you would be injured.<sup>88</sup>

The *Farmer* Court did not explain how serious the risk must be in order to be “substantial.”<sup>89</sup> But usually you must show that the risk you complain of is one that today’s society would not allow.<sup>90</sup> *Horton v. Cockrell* is a good example of this. In that case, a prisoner named Jackson wanted a prisoner named Horton to give him money. Jackson threatened to assault Horton if Horton did not pay.<sup>91</sup> Horton attempted to report the threats but the officer said there was nothing he could do about the situation.<sup>92</sup> Later that day, Jackson made “threatening gestures” at Horton. Horton punched Jackson, and they got into a fight.<sup>93</sup> Horton filed an Eighth Amendment suit against prison officials for deliberately ignoring his substantial risk of harm from Jackson. Horton won this case. The court found that there was a “substantial risk of serious harm” because society does not allow threatening people like this inside or outside of prison.<sup>94</sup>

Remember that you have to prove two things. First, you have to prove that you faced substantial risk of serious harm. This is the “objective component” of the Eighth Amendment. Second, you also have to show that prison officials ignored a risk that they knew or should have known about. This is the “subjective component.”

### C. YOUR RIGHT TO BE FREE FROM SEXUAL ASSAULT

It is wrong for any prison official to touch you sexually. It is also wrong for any prisoner to touch you sexually without your consent. Sexual assault and rape are types of assaults. “Sexual assault” means any unwanted physical contact of a sexual nature, such as fondling your genitals. The law is clear that prisoners have a right to be protected from sexual assault.<sup>95</sup>

If you were raped or sexually assaulted, you should tell a prison official as soon as you can. You should also ask to go to the hospital. At the hospital, they should test you for sexually transmitted diseases. If you can get pregnant from the assault, they should test you for pregnancy. The health professional should collect your clothing, fingernail scrapings, pubic hair samples, blood samples, hair strands, and swab samples.<sup>96</sup> If you would like to speak with someone after the sexual assault or rape, you should ask for counseling.

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<sup>86</sup> *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) (quoting *Wilson v. Seiter*, 501 U.S. 294, 298, 11 S. Ct. 2321, 2324, 115 L. Ed. 2d 271, 279 (1991)).

<sup>87</sup> *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 824 (1994).

<sup>88</sup> *See, e.g., Scott v. Moore*, 114 F.3d 51, 54 (5th Cir. 1997) (holding prison was not liable under *Farmer* test for sexual assault of female prisoner by male jailor because conditions under which she was held did not create “substantial risk” to her safety, especially since it was one-time act and officials were not aware of jailor’s behavior with female prisoners).

<sup>89</sup> *Farmer v. Brennan*, 511 U.S. 825, 834 n.3, 114 S. Ct. 1970, 1977 n.3, 128 L. Ed. 2d 811, 823 n.3 (1994) (noting in the footnotes that the Court did not reach the question of “[a]t what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes”).

<sup>90</sup> *Farmer v. Brennan*, 511 U.S. 825, 858, 114 S. Ct. 1970, 1989, 128 L. Ed. 2d 811, 838 (1994) (Blackmun, J., concurring) (noting that prison officials have a duty to ensure that “the conditions in our Nation’s prisons in fact comport with the ‘contemporary standard of decency’ required by the Eighth Amendment”).

<sup>91</sup> *Horton v. Cockrell*, 70 F.3d 397, 399 (1995) (per curiam).

<sup>92</sup> *Horton v. Cockrell*, 70 F.3d 397, 399 (1995) (per curiam).

<sup>93</sup> *Horton v. Cockrell*, 70 F.3d 397, 399 (1995) (per curiam).

<sup>94</sup> *Horton v. Cockrell*, 70 F.3d 397, 401 (1995) (per curiam).

<sup>95</sup> *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004).

<sup>96</sup> Linda M. Petter & David L. Whitehill, *Management of Female Sexual Assault*, 58 AM. FAM. PHYSICIAN 920, table 2 (1998), available at <http://www.aafp.org/afp/1998/0915/p920.html> (last visited Jan. 9, 2018).

There are many rules that protect you from sexual assault and rape, including administrative procedures, criminal laws, and civil laws. Section One below explains how you can file a complaint about your sexual assault or rape. Section Two explains criminal rules against sexual assault. Section Two also describes federal criminal law and Louisiana state criminal law that make it illegal for prison officials to have any sexual contact with you. Finally, Section Three explains how you can sue prison officials and other prisoners for sexual assault and rape under the Eighth Amendment and Louisiana state law.

### 1. Filing a Complaint

If someone sexually assaulted or raped you, you can file a legal complaint. The Louisiana Department of Corrections website says that if you want to report an issue, you can speak with prison staff. You can also write a letter to them. If prison staff does not deal with the problem, you can use the Administrative Remedy Procedure for your prison to ask for a formal review of your complaint.<sup>97</sup> You might find it difficult to report a sexual assault or rape. But you should know that you have a right to not be sexually assaulted or raped. You may fear that your complaint will not be kept secret in your prisoner file and that you will be harassed or threatened. However, it is illegal for a prison official to punish you in any way for reporting the assault.<sup>98</sup>

### 2. Criminal Charges Against Your Attacker

It is a crime for any prison official to have any sexual contact with you. Therefore, whoever sexually assaulted or raped you may be charged criminally. You cannot bring criminal charges against your attacker by yourself. However, you can ask the government to bring charges against your attacker.

Only the government can choose whether to bring criminal charges. But it is still important for you to know your rights. The following subsections explain federal and Louisiana state criminal laws that make it illegal for prison officials to touch you sexually.

#### a. Federal Criminal Law: Sexual Relationships between Federal Prisoners and Prison Officials

Section 2243 of Title 18 of the United States Code makes it a crime for prison officials to have sexual intercourse (which means sex) or any type of sexual contact with prisoners in *federal* prisons.<sup>99</sup> The law applies to anyone with “custodial, supervisory, or disciplinary authority” over you.<sup>100</sup> This means the law applies to any prison official who is in charge of you. It is a federal felony to use force or threaten force to have sex in a federal prison.<sup>101</sup> It is always illegal in a federal prison for prison officials to have sexual contact with prisoners. It is a felony if the officials use or threaten force in order to have sexual contact with a prisoner. These laws only protect *federal* prisoners. The next subsection discusses Louisiana law that protects Louisiana prisoners.

#### b. Louisiana State Criminal Law: Sexual Relationships between Prisoners and Prison Officials

A Louisiana state law makes it a felony for prison officials to have “sexual intercourse or any other sexual conduct” with a prisoner.<sup>102</sup> It is illegal for prison officials to have any sexual conduct with you, even if you consented to it.

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<sup>97</sup> Frequently Asked Questions—La. Dept. of Pub. Safety and Corrections, *available at* <http://doc.la.gov/frequently-asked-questions/> (last visited Nov. 20, 2016).

<sup>98</sup> *Campbell v. Beto*, 460 F.2d 765, 768 (5th Cir. 1972) (stating that prison officials may not threaten a prisoner with punishment for continuing his lawsuit against the officials and that “prisoner access to the courts is not to be curtailed or restricted by threats, intimidation, coercion or punishment”).

<sup>99</sup> 18 U.S.C. § 2243(b) (2012).

<sup>100</sup> 18 U.S.C. § 2243(b) (2012).

<sup>101</sup> 18 U.S.C. § 2241(a) (2012) (“Whoever, . . . in a Federal prison, . . . knowingly causes another person to engage in a sexual act (1) by using force against that other person; or (2) by threatening . . . that other person . . . shall be fined under this title, imprisoned for any term of years or life, or both.”).

<sup>102</sup> LA. STAT. ANN. § 14:134.1 (2017).

### 3. Bringing a Civil Action

If a prison official or another prisoner sexually assaulted you, you can bring a civil action against your attacker under the Eighth Amendment and under Louisiana state law. If you bring a civil suit, it is important to know that courts usually only hear claims of physical abuse. You can only win a civil suit if the court recognizes or hears the claim. They will hear emotional abuse claims only when you have also been physically injured. Under Section 803(d) of the Prison Litigation Reform Act (“PLRA”), you cannot bring a federal civil action for emotional injury unless you show that you have been physically injured, sexually assaulted, or raped.<sup>103</sup> This means it is very important to get physical evidence of sexual assault. Please read Chapter 14 of the main *JLM* for more information on the PLRA.

If a prison official sexually assaulted you, you may be able to sue him under the Eighth Amendment for “cruel and unusual punishment.”<sup>104</sup> You can also sue him under state law for assault and battery.<sup>105</sup> Even though prison officials have the right to use some force to keep order and security within the prison, they have no right to sexually abuse you.<sup>106</sup> A guard cannot touch you in a sexual way or force you to touch him or her in a sexual way, or have sexual relations with him or her, and then claim that he or she is keeping order or punishing you for breaking a rule. Consensual sex between a prisoner and a prison official may also be the basis for a lawsuit. Louisiana courts have not decided whether sex between a prisoner and a prison official is always against the Eighth Amendment. However, some other states find that consensual sex between a prisoner and prison official is a “*per se*” violation of the Eighth Amendment, meaning that it is always a violation of the Eighth Amendment.<sup>107</sup> It is definitely a violation of the Eighth Amendment if the prison official abuses his position of power to encourage you to have sex or sexual contact with him.<sup>108</sup>

If another prisoner sexually assaulted you, you can sue prison officials under state negligence law or under the Eighth amendment for being deliberately indifferent to your safety. State negligence law is described in Section B(2) above. Claims under the Eighth Amendment are described below.

If another prisoner or prison official sexually assaulted you and prison officials did not try to prevent or stop the assault, you can make an Eighth Amendment claim that prison officials were deliberately indifferent to your safety.<sup>109</sup> You must prove both the subjective and objective components of the claim.<sup>110</sup> Section B(3) of this Chapter explains how to prove these elements. Because letting a prisoner

<sup>103</sup> Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(e) (2012).

<sup>104</sup> *Hudson v. McMillian*, 503 U.S. 1, 8, 112 S. Ct. 995, 1000, 117 L. Ed. 2d 156, 167 (1992).

<sup>105</sup> LA. STAT. ANN. § 14:43.1 (2017) (sexual battery); LA. STAT. ANN. § 14:35 (2017) (simple battery); LA. STAT. ANN. § 14:38 (2017) (simple assault).

<sup>106</sup> *Alberti v. Klevenhagen*, 790 F.2d 1220, 1224 (5th Cir. 1986) (“A prisoner has a right to be protected from the constant threat of violence and from sexual assault.”) (quoting *Jones v. Diamond*, 636 F.2d 1364, 1373 (5th Cir. 1981)); *Women Prisoners of D.C. Dep’t. of Corr. v. D.C.*, 877 F. Supp. 634, 665 (D.D.C. 1994) (“Rape, coerced sodomy, unsolicited touching of women prisoners’ vaginas, breasts and buttocks by prison employees are ‘simply not part of the penalty that criminal offenders pay for their offenses against society.’”) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 811, 823 (1994)), *vacated in part on other grounds*, 93 F.3d 910, 320 U.S. App. D.C. 247 (D.C. Cir. 1996).

<sup>107</sup> *Carrigan v. Davis*, 70 F. Supp. 2d 448, 454–455 (D. Del. 2007) (finding that sexual conduct between a prison guard and a prisoner, even if consensual in nature, is a *per se* (automatic) violation of criminal law and thus a violation of the 8th Amendment).

<sup>108</sup> *White v. Ottinger*, 442 F. Supp. 2d 236, 247–248 (E.D. Pa. 2006) (finding that a prisoner who engages in non-forceful sexual conduct with a prison official because he “feared repercussions if he did not submit to [the prison official’s] advances” is not consensual and thus potentially in violation of the 8th Amendment).

<sup>109</sup> *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 824 (1994) (holding that to violate the 8th Amendment, a prison official must have a “sufficiently culpable state of mind” which means one of “deliberate indifference” to prisoner health or safety) (citing *Wilson v. Seiter*, 501 U.S. 294, 302–303, 111 S. Ct. 2321, 2326–2327, 115 L. Ed. 2d 271, 281–282 (1991)).

<sup>110</sup> *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) (discussing the two components necessary to prove an 8th Amendment Claim: sufficiently serious harm and a sufficiently culpable state of mind). See Section B(3) of this Chapter for more information on the objective and subjective components of 8th Amendment violations.

rape you does not serve a goal of the criminal justice system,<sup>111</sup> some courts have found that the sexual abuse alone is enough to prove that the prison officials were culpable (which means guilty).<sup>112</sup> However, the Fifth Circuit in *Scott v. Moore* held that a city did not have a culpable state of mind. The city had under-staffed a city jail, which made it possible for a jailor to sexually assault a prisoner. The court found that the city was not deliberately indifferent to the prisoner's safety because the under-staffing alone did not harm the prisoner.<sup>113</sup> Therefore, the city was not deliberately indifferent to the prisoner's constitutional rights.<sup>114</sup> See Chapter 24, Section C(2), of the main *JLM* for more information on Eighth Amendment claims for sexual assault.

Both male and female prisoners are sexually assaulted and/or raped. However, female prisoners are particularly likely to be sexually assaulted<sup>115</sup> and courts are sometimes more open to the claims made by female prisoners. For example, some courts have found it unconstitutional for male guards to search female prisoners in some settings, but constitutional for female guards to search male prisoners in the same settings.<sup>116</sup>

#### D. CONCLUSION

This Chapter explained the legal meaning of “assault” and explained your right to be free from physical and sexual assault in prison. Different kinds of laws protect you against assault from prison officials and prisoners. Remember to complete the prison's administrative grievance or complaint processes before you file suit. If you do not use the prison's grievance process first, courts might not hear your case.

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<sup>111</sup> *Farmer v. Brennan*, 511 U.S. 825, 833, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 548, 104 S. Ct. 3194, 3211, 82 L. Ed. 2d 393, 417 (1984)) (“[G]ratuitously allowing the . . . rape of one prisoner by another serves no ‘legitimate penological objective.’”).

<sup>112</sup> See, e.g., *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997); see also *Hudson v. McMillian*, 503 U.S. 1, 6–7, 112 S. Ct. 995, 998–999, 117 L. Ed. 2d 156, 164 (1992).

<sup>113</sup> *Scott v. Moore*, 114 F.3d 51, 53–54 (1997) (holding city was not liable, even though prisoner successfully proved violation was committed with subjective deliberate indifference to her constitutional rights, because city never received any sexual assault reports on any jailors and this jailor had previously undergone background check, medical exam, and polygraph test, without raising any concerns).

<sup>114</sup> *Scott v. Moore*, 114 F.3d 51, 53 (1997) (“Here, however, [the prisoner] did not suffer from the mere existence of the alleged inadequate staffing, but only from . . . specific sexual assaults committed on but one occasion.”).

<sup>115</sup> All Too Familiar: Sexual Abuse of Women in U.S. State Prisons, available at <http://hrw.org/reports/1996/Us1.htm#> (last visited Sept. 6, 2017) (noting that the female prisoner population is “a population largely unaccustomed to having recourse against abuse; all the more necessary, then, for the state to present the available means of recourse clearly and in an accessible fashion”).

<sup>116</sup> See, e.g., *Oliver v. Scott*, 276 F.3d 736, 739 (5th Cir. 2002) (holding that 4th and 14th Amendments were not violated after female prison guards strip searched male prisoner and observed him showering); see also Chapter 25 of the main *JLM*, “Your Right To Be Free From Illegal Body Searches,” for more information about cross-gender body searches.

## CHAPTER 8: LOUISIANA STATE LIBERTIES\*

### A. INTRODUCTION

This Supplement Chapter explains how civil liberties are treated in the Fifth Circuit and Louisiana. For the most part, both the Fifth Circuit and the Louisiana courts will follow the Supreme Court's rulings. However, there are times when the Fifth Circuit or a Louisiana court will interpret things differently, or may look at a certain issue in more detail than the Supreme Court has.

This Chapter will focus on procedural hurdles (court rules you have to follow) and substantive claims (why you're suing) for violations of civil liberties. Part B will focus on how the Fifth Circuit has interpreted 42 U.S.C. § 1983 ("Section 1983") of the Civil Rights Act. This Part will discuss procedural hurdles, such as immunities and the Prison Litigation Reform Act ("PLRA"). Next, this Part will discuss substantive claims. Part C will focus on bringing claims in Louisiana state courts and discuss procedural hurdles, such as immunities; the Louisiana Prison Litigation Reform Act; and the Administrative Remedy Procedure (ARP). This Part will also talk about substantive claims. Chapter 10, Appendix A contains a blank "*in forma pauperis*" form.

### B. SECTION 1983 ACTIONS FOR VIOLATIONS OF FEDERAL LAW

Section 1983 is a law that allows you to sue state and local officials who have violated your rights under the U.S. Constitution and other federal laws. To sue federal officials, you must use a *Bivens* action. See Chapter 16, Part E, of the main *JLM* for information on how to file a *Bivens* action.

Section 1983 states:

Every *person* who, *under color of* any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the *deprivation of any rights, privileges, or immunities secured by the Constitution and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .<sup>1</sup>

#### 1. Procedural Hurdles (Court Rules)

This section will focus on the procedural issues involved in bringing a federal claim. Specifically, it will discuss immunities that might exist for your claim and requirements set out in the Prison Litigation Reform Act.

##### a. Immunities

When you sue a defendant, there are several defenses he or she might raise against your claim. This section will focus on the different types of immunities that are available under federal law. An immunity is a defense that protects certain individuals or agencies from being held legally responsible, even if they have done something wrong. This section mostly explains how the immunity rules work as interpreted in the Fifth Circuit, but you should also refer to Chapter 16 of the main *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," which explains the general federal standards of immunity. You should be aware of these immunities when deciding whom to name as defendants in your lawsuit and what actions to discuss.

##### i. Eleventh Amendment Immunity

The Eleventh Amendment to the U.S. Constitution protects states and their agencies from being

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\*This Supplement Chapter was written by Nathiya Nagendra.

<sup>1</sup> 42 U.S.C. § 1983 (2012) (emphasis added).

sued in Federal Court.<sup>2</sup> As a result, you cannot name the state of Louisiana or any of the Louisiana agencies as a defendant in your suit.<sup>3</sup> This is sometimes called “sovereign immunity.” Eleventh Amendment immunity also covers the state’s officers, agents, and employees.<sup>4</sup> This means the courts will not find a state liable (legally responsible) for the actions of its officers, agents or employees. Whether an entity (an individual, group, agency, etc.) is covered by Eleventh Amendment immunity depends on the entity’s: (1) status under Louisiana statutes and case law, (2) funding, (3) local autonomy or independence, (4) concern with local or statewide problems, (5) ability to sue in its own name, and (6) right to hold and use property.<sup>5</sup> The second factor is the most important factor, because one of the reasons for the Eleventh Amendment is to protect state money.<sup>6</sup> This means that all Louisiana executive departments, including the Department of Public Safety and Corrections (DPSC), have immunity.<sup>7</sup> You also cannot sue individual prisons, such as Angola, because they fall under the supervision of the DPSC.<sup>8</sup>

There are two important situations where Eleventh Amendment immunity will not bar your action: (1) when you sue an officer of the state in their official capacity for *injunctive* (an order from the court to the person you sued to do something or to stop doing something) or *declaratory relief* (a court statement of what your rights are), not monetary damages;<sup>9</sup> and (2) when the state’s legislature has granted you permission to sue the state through a general law or concurrent resolution (a legislative provision approved by both the Louisiana House of Representatives and the Louisiana Senate).<sup>10</sup> Even though Eleventh Amendment immunity protects state officials when sued in their *official capacity*, it does not protect them when they are sued in their *individual capacity*.<sup>11</sup> Therefore, if you are seeking monetary damages and suing a state official, you must sue them in their individual capacities.

Generally, if you bring a suit against a state official acting in their official capacity in order to prevent a state official from violating your rights, this action will not be barred by the state’s Eleventh Amendment immunity. This type of action might arise in two different circumstances. The first situation occurs when a state official’s actions are illegal or unauthorized by the state; in these cases, if you sue to

<sup>2</sup> U.S. CONST. amend. XI; *Hans v. Louisiana*, 134 U.S. 1, 15–17, 10 S. Ct. 504, 507–508, 33 L. Ed. 842, 847–848 (1890) (finding that a state could not be sued in federal court by its own citizen, because the state had not consented to such jurisdiction and therefore had sovereign immunity).

<sup>3</sup> La. CONST. art. XII, § 10; *Ussery v. Louisiana*, 150 F.3d 431, 434 (5th Cir. 1998) (citing *Seminole Tribe v. Florida*, 517 U.S. 44, 54, 116 S. Ct. 1114, 1122, 134 L. Ed. 2d 252, 265 (1996)) (stating that individuals are barred from suing a state for money damages in federal court).

<sup>4</sup> *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S. Ct. 1347, 1355, 39 L. Ed. 2d 662, 672 (1974) (citing *Ford Motor Co. v. Dep’t. of Treasury*, 323 U.S. 459, 464, 65 S. Ct. 347, 350, 89 L. Ed. 389, 394 (1945)) (finding that state officials may invoke 11th Amendment immunity when they are sued in their official capacities).

<sup>5</sup> *Hudson v. City of New Orleans*, 174 F.3d 677, 681, 1999 U.S. App. LEXIS 9184, at \*9 (5th Cir. 1999) (citing *Clark v. Tarrant County*, 798 F.2d 736, 744 (5th Cir. 1986)) (reiterating six factors a court will consider when determining whether a suit against a government official is a suit against the state for the purpose of 11th Amendment immunity).

<sup>6</sup> *Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147–148, 1991 U.S. App. LEXIS 15928, at \*11 (5th Cir. 1991) (citing *McDonald v. Bd. of Miss. Levee Comm’rs*, 832 F.2d 901, 907, 1987 U.S. App. LEXIS 15499, at \*19 (5th Cir. 1987)) (“Because an important goal of the Eleventh Amendment is the protection of state treasuries, the most significant factor in assessing an entity’s status is whether a judgment against it will be paid with state funds.”).

<sup>7</sup> *Champagne v. Jefferson Parish Sheriff’s Office*, 188 F.3d 312, 313–314, 1999 U.S. App. LEXIS 22865, at \*1–4 (5th Cir. 1999) (per curiam) (citing *Darlak v. Bobear*, 814 F.2d 1055, 1060, 1987 U.S. App. LEXIS 5148, at \*12 (5th Cir. 1987)) (denying plaintiff’s motion to compel evidence and request subpoena on grounds that defendants Governor and state Department of Public Safety and Corrections each have 11th Amendment immunity).

<sup>8</sup> *Kervin v. City of New Orleans*, No. 06-3231, 2006 WL 2849861, at \*4 (E.D. La. Sept. 28, 2006) (finding that Angola is considered property of the DCPS under Louisiana law and thus cannot be sued).

<sup>9</sup> *Nelson v. Univ. of Tex.*, 535 F.3d 318, 321–322 (5th Cir. 1998) (finding that the 11th Amendment does not bar claims against prospective, or future, relief against state officials acting in their official capacity). *See also* Section 3(a) of Chapter 16 of the main *JLM*.

<sup>10</sup> *Kervin v. City of New Orleans*, 2006 WL 2849861, at \*2 (E.D. La. 2006) (unpublished) (citing LA. REV. STAT. ANN. § 13:5106(A) (2017)) (finding that the Louisiana legislature had not granted the plaintiff permission to sue the state in § 1983 claims).

<sup>11</sup> *See Hafer v. Melo*, 502 U.S. 21, 31, 112 S. Ct. 358, 363, 116 L. Ed. 2d 301, 313 (1991) (holding that state officials, when sued in their individual capacities are “persons” within the meaning of § 1983 and therefore are not immune under the 11th Amendment).

protect your rights against that state official, your action will not be barred.<sup>12</sup> The second situation where Eleventh Amendment immunity does not bar your action is when you bring an action to seek a declaratory judgment that the state law itself, which the state's agents are following, is unconstitutional.<sup>13</sup>

The second major instance where Eleventh Amendment immunity will not bar your suit occurs when the legislature waives immunity or consents to be sued. In Louisiana, there is a constitutional waiver of sovereign immunity for state, state agencies, and political subdivisions in contract cases and in tort cases, or cases where there has been injury to a person or property.<sup>14</sup> This waiver is discussed below in Section C(1)(a) and only applies to contract and tort claims in state court since there is no express consent to allow suits against the state in federal court.<sup>15</sup>

Eleventh Amendment immunity does not cover Louisiana counties,<sup>16</sup> sheriffs,<sup>17</sup> or district attorneys.<sup>18</sup> This means that you can sue these individuals under federal law if other requirements are met and their actions do not fall under other types of immunity.

## ii. *Qualified Immunity*

A state employee may be sued in one of two capacities. If you sue a state employee in his official capacity, they may raise the defense of sovereign immunity so long as this defense has not been waived by a statute. If you sue a state employee in their individual capacity, they will not be able to claim sovereign immunity as a defense; however, a state employee might be able to raise a defense of “qualified immunity.” Qualified immunity is an affirmative defense (a defense that the person you sue can put on and that if they prove, will make them not liable) that protects government employees from having to stand trial, having to pay monetary damages, and from otherwise being held liable for acts committed in their personal capacity.<sup>19</sup> Unlike Eleventh Amendment immunity and absolute immunity, discussed in Parts (i) and (iii) of this section, qualified immunity focuses on specific actions that are protected, not particular government entities and individuals that are protected. You should refer to Chapter 16, Section 3(c) of the main *JLM* for more information on this topic.

It is important to remember that sovereign immunity is not the same as qualified immunity. This means that even though a state employee's sovereign immunity might be waived by a statute, their qualified immunity will not be affected. If the defendant does not plead qualified immunity as a defense against your suit or fails to show all the elements of qualified immunity, then that governmental employee will no longer be protected by this doctrine.<sup>20</sup> Qualified immunity only shields conduct that does not violate clearly established constitutional rights of which a reasonable person would have known.<sup>21</sup>

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<sup>12</sup> *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 361–362, 116 L. Ed. 2d 301, 309 (1991).

<sup>13</sup> Suits for injunctive relief against state officials in their official capacities are said to fall within the “*Ex parte Young* doctrine.” *Ex parte Young* is the case where the Supreme Court said that state officials can be sued for an injunction in federal court, even though the state itself cannot be sued. *Ex parte Young*, 209 U.S. 123, 155–156, 28 S. Ct. 441, 452, 52 L. Ed. 714 (1908).

<sup>14</sup> LA. CONST. art. XII, § 10(A). For more information on tort claims, see Chapter 10 of the *Louisiana State Supplement*.

<sup>15</sup> LA. REV. STAT. ANN. § 13:5106(A) (2017) (“No suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court.”); see also *Fairley v. Stalder*, 294 F. App'x. 805, 811 (5th Cir. 2008) (per curiam) (unpublished) (finding that Louisiana and the DPSC had sovereign immunity in suit regarding treatment of prisoners during and after Hurricane Katrina).

<sup>16</sup> *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658, 694–695, 98 S. Ct. 2018, 2037–2038, 56 L. Ed. 2d 611, 638 (1978).

<sup>17</sup> *Porche v. St. Tammany Parish Sheriff's Office*, 67 F. Supp. 2d 631, 636 (E.D. La. 1999).

<sup>18</sup> *Hudson v. City of New Orleans*, 174 F.3d 677, 682–683 (5th Cir. 1999) (finding that the Orleans Parish District Attorney's Office is not an arm of the state, even though the Louisiana constitution says otherwise, and thus does not have 11th Amendment immunity).

<sup>19</sup> *Roberts v. City of Shreveport*, 397 F.3d 287, 291–292 (5th Cir. 2005) (finding that Chief of Police has qualified immunity in claim of allegedly providing inadequate training).

<sup>20</sup> *Gomez v. Toledo*, 446 U.S. 635, 639, 100 S. Ct. 1920, 1923, 64 L. Ed. 2d 572, 577–578 (1980).

<sup>21</sup> *Austen v. Borel*, 830 F.2d 1356, 1358 (5th Cir. 1987) (finding that Louisiana child protection workers are entitled to qualified immunity, not absolute immunity, for their conduct in filing an allegedly false verified complaint seeking the removal of two children from a home).

Qualified immunity generally applies to governors,<sup>22</sup> prison officials,<sup>23</sup> and police officers,<sup>24</sup> among others. If someone you are suing claims qualified immunity as a defense, you will have the burden of showing qualified immunity does not apply.<sup>25</sup> First you must claim that the official violated the Constitution.<sup>26</sup> Second, you must claim the official's actions were objectively unreasonable in light of the law that was clearly established at the time of the actions complained of.<sup>27</sup> *In other words, the law must be clear enough that a reasonable official would understand that what he is doing violates the law.*

Unlike government officials sued in their individual capacities, municipal (city or town) entities and local governing bodies do not have immunity, qualified or absolute, from suit.<sup>28</sup> This means that a municipality (a city or a town) can be sued under Section 1983, but it will not be held liable unless a municipal policy or custom caused the injury.<sup>29</sup> Thus, in order to sue a Louisiana municipality, you must show that a policy or custom of the municipality caused your rights to be violated and that someone who is a final policymaker for the municipality created that policy.<sup>30</sup> Generally, this means the policy or custom must be unconstitutional on its face. If there is no policy or custom causing your injury, then a municipality can be held “indirectly” liable when its failure to adequately train, supervise, or discipline employees results in a violation of your rights.<sup>31</sup> For more information, *see* Section (C)(2)(c), “Municipal or Local Government Liability” in Chapter 16 of the main *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 To Obtain Relief From Violations of Federal Law.”

### iii. *Absolute Immunity of Individuals*

There are certain types of individuals who are absolutely immune from suit for their actions within the scope of their official duties. If an official is absolutely immune, it means that they cannot be sued for monetary damages and sometimes cannot be sued for injunctive relief.<sup>32</sup> Judges<sup>33</sup> and prosecutors<sup>34</sup> are usually completely immune from liability for damages within the scope of their official duties.

The absolute immunity of judges is also referred to as “judicial immunity.” Judicial immunity serves to protect all judicial acts that are performed within a judge's official duties.<sup>35</sup> The main policy reason for judicial immunity is to allow judges to make unbiased decisions on the issue at hand without having to

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<sup>22</sup> *See* *Champagne v. Jefferson Parish Sheriff's Office*, 188 F.3d 312, 314 (5th Cir. 1999) (per curiam) (holding that the governor is entitled to qualified immunity).

<sup>23</sup> *See* *Cleavinger v. Saxner*, 474 U.S. 193, 106 S. Ct. 496, 497, 88 L. Ed. 2d 507, 507 (holding that members of federal prison discipline committee are entitled to qualified, but not absolute, immunity); *see also* *Procunier v. Navarette*, 434 U.S. 555, 560–561, 98 S. Ct. 855, 859, 55 L. Ed. 2d 24, 30 (1978) (holding that state prison administrators are entitled only to qualified immunity).

<sup>24</sup> *See* *Malley v. Briggs*, 475 U.S. 335, 343, 106 S. Ct. 1092, 1097, 89 L. Ed. 2d 271, 279–280 (1986).

<sup>25</sup> *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002).

<sup>26</sup> *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 252–253 (5th Cir. 2005).

<sup>27</sup> *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 253 (5th Cir. 2005).

<sup>28</sup> *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166, 113 S. Ct. 1160, 1162, 122 L. Ed. 2d 517, 523 (1993).

<sup>29</sup> *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166, 113 S. Ct. 1160, 1162, 122 L. Ed. 2d 517, 523 (1993).

<sup>30</sup> *Pembaur v. Cincinnati*, 475 U.S. 469, 481–482, 106 S. Ct. 1292, 1299–1300, 89 L. Ed. 2d 452, 464–465 (1986) (plurality) (noting that municipalities can only be held liable under § 1983 for policies made by officials who had final authority to make the challenged policy).

<sup>31</sup> *See* *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197, 1204, 103 L. Ed. 2d 412, 426 (1989) (noting that a city could be liable under § 1983 for failure to train its employees, if the failure amounted to deliberate indifference to the rights of people who come into contact with city employees).

<sup>32</sup> For more information on the federal standards of absolute immunity, you should refer to Section C(3)(b) of Chapter 16 of the main *JLM*.

<sup>33</sup> *Malina v. Gonzales*, 994 F.2d 1121, 1124 (5th Cir. 1993) (finding that a judge has judicial immunity when he takes action within his judicial capacity and has jurisdiction).

<sup>34</sup> *Russell v. Millsap*, 781 F.2d 381, 383 (5th Cir. 1985) (citing *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976)); *Knapper v. Connick*, 96-0434, p. 10 (La. 10/15/96); 681 So. 2d 944, 950 (La. 1996).

<sup>35</sup> *Adams v. McIlhenny*, 764 F.2d 294, 297 (5th Cir. 1985) (citing *Stump v. Sparkman*, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978)).



worry about the possibility of future suits against the judge personally.<sup>36</sup> As a result, judicial immunity protects all judicial acts performed within a judge's jurisdiction, even when the judge is accused of acting corruptly, maliciously,<sup>37</sup> incorrectly, or in excess of his or her authority.<sup>38</sup> To figure out what constitutes a judicial act, the Fifth Circuit usually considers four factors:

- 1) Whether the acts complained of were normal judicial functions;
- 2) Whether the act occurred in a courtroom or other appropriate place, such as judge's chambers;
- 3) Whether the controversy involved a case pending before the judge; and
- 4) Whether the act arose out of a visit to the judge in his judicial capacity.<sup>39</sup>

Generally, a court will not limit itself to only looking at these four factors but will look broadly at the nature and purpose of the actions.<sup>40</sup>

Judicial immunity will also apply to *quasi-judicial officials*, who perform similar functions to judges, in a setting similar to a court, such as an administrative agency's process for settling disputes.<sup>41</sup> There are also instances where a non-judge will be protected by derived judicial immunity, which is a type of quasi-judicial immunity. In order to receive derived judicial immunity, the defendant must have exercised discretionary judgment (meaning the defendant had the freedom to make a choice among options) just like a judge. For example, when a judge authorizes or appoints another person to perform services for the court and that person exercises discretionary judgment, he will be protected by derived judicial immunity.<sup>42</sup>

Prosecutorial officials are also absolutely immune from claims for money damages brought for conduct performed in the role of prosecutor. This means that when a prosecutor is performing typical prosecutorial functions, they will enjoy absolute immunity from any claim for civil liability arising out of the performance of these duties.<sup>43</sup> Prosecutorial functions, for the purposes of absolute immunity, are those acts representing the government in filing and presenting cases, as well as other acts which are closely related with the judicial process.<sup>44</sup> This includes acts taken to prepare for or begin judicial proceedings or trial and acts that occur in the course of a prosecutor's role representing the state.<sup>45</sup> Therefore, a prosecutor will be protected by absolute immunity even if he knowingly uses false testimony, purposely withholds exculpatory information (information that shows the plaintiff is not guilty), or fails to make a full disclosure of the facts.

In general, it is important to keep in mind what actions will be protected by qualified immunity and which government entities or individuals will be protected by the Eleventh Amendment or absolute immunity when writing your claim. For more clarification on immunities, see **Figure 1** below:

| Type of Defendant     | Type of Immunity                        | Relief You Can Obtain |
|-----------------------|---|-----------------------|
| State or state agency | Eleventh Amendment (sovereign) immunity | None                  |

<sup>36</sup> Forrester v. White, 484 U.S. 219, 223, 108 S. Ct. 538, 542, 98 L. Ed. 2d 555, 562—563 (1988).

<sup>37</sup> Moore v. Taylor, 541 So. 2d 378, 381 (La. Ct. App. 1989) (citing Stump v. Sparkman, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978)).

<sup>38</sup> Severin v. Parish of Jefferson, 357 F. App'x. 601, 604—605 (5th Cir. 2009) (citing Stump v. Sparkman, 435 U.S. 349, 356, 98 S. Ct. 1099, 1105, 55 L. Ed. 2d 331, 339 (1978)).

<sup>39</sup> Ammons v. Baldwin, 705 F.2d 1445, 1447 (5th Cir. 1983) (finding a Mississippi State Justice Court Judge to have judicial immunity for issuing an arrest warrant and requiring the plaintiff to pay court costs for himself and others).

<sup>40</sup> Holloway v. Walker, 765 F.2d 517, 524 (5th Cir. 1985).

<sup>41</sup> Beck v. Tex. State Bd. of Dental Exam'rs, 204 F.3d 629, 635—636 (5th Cir. 2000) (applying quasi-judicial absolute immunity to state board of dental examiners when they acted in a quasi-judicial role in disciplinary proceedings).

<sup>42</sup> Davis v. Bayless, 70 F.3d 367, 374 (5th Cir. 1995) (finding that court-appointed receiver was entitled to derivative judicial immunity).

<sup>43</sup> Russell v. Millsap, 781 F.2d 381, 383 (5th Cir. 1985) (citing Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976)).

<sup>44</sup> Cousin v. Small, 325 F.3d 627, 631—632 (5th Cir. 2003) (citing Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976)).

<sup>45</sup> Buckley v. Fitzsimmons, 509 U.S. 259, 273, 113 S. Ct. 2606, 2615, 125 L. Ed. 2d 209, 226 (1993).

|   |   |  |
|---|---|--|
| Any officials sued in their <i>individual</i> capacity  | Qualified Immunity  | - Declaratory judgment<br>- Injunctive relief<br>- Money damages, only if:<br>a) The official does not raise the qualified immunity defense; or<br>b) He does raise the defense, but you can demonstrate that a reasonable person would have known that his actions violated a clearly established right |
| State officials in their <i>official</i> capacity   | Eleventh Amendment (sovereign) immunity from suit for money damages only  | -Declaratory judgment<br>-Injunctive relief  |
| Non-state (local or municipal) officials in their official capacity                               | None  | -Declaratory judgment<br>-Injunctive relief<br>-Money damages  |
| Witnesses   | Absolute immunity   | None, unless you are alleging that the individual violated your rights at a time that he was not acting as a witness   |
| Legislators and individuals authorized to perform legislative functions                           | Absolute immunity from any suit for actions performed within the scope of official legislative duties   | None, unless you are alleging that the individual violated your rights while acting outside the scope of his official duties   |
| Prosecutors   | Absolute immunity from suit for money damages only, for actions performed within the scope of official prosecutorial duties                               | -Declaratory judgment<br>-Injunctive relief  |
| Judges (including administrative judges)  | Absolute immunity from suit for damages, for actions performed within the scope of judicial duties, unless acting with a complete absence of jurisdiction | -Declaratory judgment<br>-Injunctive relief, but only if a declaratory judgment has been violated or is not available  |
| Municipalities  | Immunity from punitive damages  | -Declaratory judgment<br>-Injunctive relief<br>-Attorney's fees  |
| Private parties acting under color of state law (such as prison guards at a privately run prison) | Qualified immunity in some circumstances  | -Declaratory judgment<br>-Injunctive relief<br>-Money damages (see above)  |

#### b. The Prison Litigation Reform Act

The Prison Litigation Reform Act ("PLRA") makes it harder for prisoners to file lawsuits in federal court. It does this by changing some sections of the United States Code that address civil rights litigation and *in forma pauperis* proceedings. *In forma pauperis* proceedings are those where you file a lawsuit as a poor person and therefore avoid many of the regular fees and costs of filing a suit.

The purpose of this section is to keep you informed of the provisions of the PLRA, and to explain how the Fifth Circuit has interpreted certain sections of the PLRA so that you will know how to defend yourself in federal courts. This Chapter only addresses certain provisions of the PLRA and acts merely as a supplement to the information provided in the main *JLM*. Therefore, it is important that you also refer to Chapter 14 of the main *JLM*, "Prison Litigation Reform Act," for information on the general legal effects of the PLRA across the country.

This section will first focus on the “three strikes” provision, which states that if you have three cases dismissed as frivolous, malicious, or failing to state a valid legal claim, you can no longer use the *in forma pauperis* procedure and will have to pay the entire filing fee in advance. This section will then discuss the PLRA’s requirement that you exhaust (use up) all administrative remedies before you will be allowed in court—it is very important to understand exactly what this requirement entails.

i. *The “Three Strikes” Provision*

The “three strikes” provision is one of the harshest provisions of the PLRA. It states:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section [*in forma pauperis*] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.<sup>46</sup>

This provision means that you will be barred from proceeding with a federal suit *in forma pauperis* if you have three civil actions or appeals dismissed for frivolousness, maliciousness, or failure to state a claim.<sup>47</sup> Once you have “three strikes,” the only way that you will be able to proceed with your action without prepayment of fees is to demonstrate that you are subject to imminent (immediate) danger of serious physical injury.<sup>48</sup> Otherwise, once you have three strikes, you have to pay the full filing fee upfront.<sup>49</sup>

The Fifth Circuit has stated that because there is no absolute right to pursue a claim *in forma pauperis*, the application of the “three strikes” provision does not raise retroactivity concerns.<sup>50</sup> What this means is that even if one of your previous civil claims or appeals was dismissed for frivolousness, maliciousness, or failure to state a claim *before* the PLRA was enacted, it will still count as one of your “three strikes.” It also means that if your claim was pending when the PLRA was enacted, the “three strikes” provision will also apply to that claim.

(a) Who is a “prisoner”?

The PLRA’s “three strikes” provision only applies to suits filed by those who are prisoners at the time the suit is filed, and can only bar prisoners from proceeding *in forma pauperis* in a civil action or appeal of a civil action.<sup>51</sup> One question that the Fifth Circuit has addressed is how to define “prisoner” within the definition of the PLRA. In order to determine whether you will be considered a “prisoner,” you need to consider two questions: (1) whether you are incarcerated or detained in any facility; and (2) if so, whether it is as a result of a criminal conviction.<sup>52</sup> In order to be considered a “prisoner” under the PLRA, you have to be able to answer “yes” to both these questions.

<sup>46</sup> 28 U.S.C. § 1915(g) (2012). This section does not apply to a person who is not a prisoner when he or she files suit. *See* Castillo v. Asparion, 109 F. App’x. 653, 654–655 (5th Cir. 2004) (per curiam) (stating that district court’s dismissal of Castillo’s failure to state a claim did not count as strike because he was not incarcerated when he filed that complaint).

<sup>47</sup> Carson v. Johnson, 112 F.3d 818, 821–822 (5th Cir. 1997) (holding that the three strikes section did not block prisoner’s access to courts in a way that would violate due process).

<sup>48</sup> Bell v. Livingston, 356 F. App’x. 715, 716–717 (5th Cir. 2009) (per curiam) (stating that even if Bell’s complaint passed the imminent danger requirement, he failed to state a claim upon which relief may be granted).

<sup>49</sup> Adepegba v. Hammons, 103 F.3d 383, 387 (5th Cir. 1996) (stating that this requirement to pay full fees merely puts prisoners who abuse a privilege on the same footing as everyone else).

<sup>50</sup> Adepegba v. Hammons, 103 F.3d 383, 385–386 (5th Cir. 1996) (holding that the PLRA could constitutionally apply to the current appeal, which had been filed before the PLRA was enacted).

<sup>51</sup> Jackson v. Johnson, 475 F.3d 261, 265–267 (5th Cir. 2007) (per curiam) (holding that Jackson, who had been released from prison and was residing in a halfway house, was considered a “prisoner” within the definition of the PLRA); Janes v. Hernandez 215 F.3d 541, 543 (5th Cir. 2000) (holding that the PLRA only applies to suits filed by prisoners).

<sup>52</sup> Jackson v. Johnson, 475 F.3d 261, 265 (5th Cir. 2007) (per curiam); *see also* 28 U.S.C. § 1915(g), (h) (2012).

As for the first issue, if you are in prison, then you will clearly be considered by the court to be incarcerated or detained. If you have not been released into the general public, but are being detained in a facility, such as a halfway house that you may leave for only limited purposes, then you will be considered by the Fifth Circuit to be “incarcerated or detained” under the definition of the PLRA.<sup>53</sup>

The second question asks whether or not your incarceration is the result of a *criminal conviction*. If it is not, then you will not be considered a “prisoner” within the definition of the PLRA. For example, if you are being detained for a violation of immigration law rather than criminal law, you will not be barred from suit under the PLRA.<sup>54</sup> It is similarly the case that prisoners in civil confinement, for example mental institutions, will not be considered “prisoners” under the PLRA.<sup>55</sup>

**(b) What counts as a “strike”?**

The statute states that you gain a “strike” when you bring an action or appeal to a court that gets dismissed for frivolousness, maliciousness, or failure to state a claim upon which relief may be granted.<sup>56</sup>

The Fifth Circuit has stated that when an appeals court merely affirms that the district court below did not err in dismissing a claim for one of the reasons stated in the PLRA, that appeal will not count as a separate strike.<sup>57</sup> However, if you decide to argue different issues in your appeal, which is then dismissed for one of the reasons stated in the PLRA, that appeal will count as a separate strike.<sup>58</sup> When an appeals court reverses a lower court’s dismissal of a claim that was found to be malicious, frivolous, or without a proper claim, such reversal erases that “strike.”<sup>59</sup>

The Fifth Circuit has also held that a district court’s dismissal of a claim for the reasons stated in the PLRA will *not* count as a “strike” until you have exhausted (used up) or waived your appeals.<sup>60</sup> Therefore, if you receive a third strike in a district court decision, you will still be able to appeal that decision *in forma pauperis*.

The PLRA requirements do not apply to habeas actions because habeas proceeding are often outside the reach of the phrase “civil action,” and because applying the “three strikes” provision to habeas proceedings would go against the long tradition of prisoners having access to federal habeas corpus.<sup>61</sup> In order to determine whether your suit is a civil action within the meaning of the PLRA or a habeas proceeding, you need to consider whether a favorable determination from the court would automatically entitle you to an earlier release; if it would, then your claim will be considered a habeas proceeding.<sup>62</sup>

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<sup>53</sup> Jackson v. Johnson, 475 F.3d 261, 265–266 (5th Cir. 2007) (per curiam) (citing Kerr v. Puckett, 138 F.3d 321 (7th Cir. 1998)). Kerr v. Puckett held that a parolee is not a “prisoner” within the definition of the PLRA.

<sup>54</sup> Ojo v. INS, 106 F.3d 680, 682 (5th Cir. 1997) (holding that a detainee of the INS is not a “prisoner” within the PLRA).

<sup>55</sup> Jackson v. Johnson, 475 F.3d 261, 266 (5th Cir. 2007) (per curiam) (citing Kolocotronis v. Morgan, 247 F.3d 726, 728 (8th Cir. 2001)); Page v. Torrey, 201 F.3d 1136, 1139–1140 (9th Cir. 2000).

<sup>56</sup> 28 U.S.C. § 1915(g) (2012).

<sup>57</sup> Adepegba v. Hammons, 103 F.3d 383, 385 (5th Cir. 1996).

<sup>58</sup> Adepegba v. Hammons, 103 F.3d 383, 388 (5th Cir. 1996) (stating that when Adepegba’s appeal raised the issue that the district court improperly dismissed his complaint without service of process and was later dismissed for frivolousness, such appeal counted as a separate strike from the district court dismissal).

<sup>59</sup> Adepegba v. Hammons, 103 F.3d 383, 387 (5th Cir. 1996).

<sup>60</sup> Adepegba v. Hammons, 103 F.3d 383, 387–388 (5th Cir. 1996) (stating that because Adepegba did not appeal previous dismissals at the district level within the deadline to file an appeal, he was considered to have waived his appeal and therefore the dismissals counted as strikes against him).

<sup>61</sup> Carson v. Johnson, 112 F.3d 818, 820 (5th Cir. 1997) (stating that Carson would be able to proceed *in forma pauperis* if his action was determined to be a habeas suit); see also United States v. Cole, 101 F.3d 1076, 1077 (5th Cir. 1996) (stating that PLRA requirements do not apply to habeas actions).

<sup>62</sup> Carson v. Johnson, 112 F.3d 818, 820–821 (5th Cir. 1997) (finding that because Carson did not allege that a reassignment from administrative segregation would automatically shorten his sentence or lead to immediate release, Carson’s action was a § 1983 action to which the PLRA requirements applied).

## ii. *Exhaustion of Administrative Remedies*

The PLRA exhaustion requirement states: No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983] . . . or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.<sup>63</sup>

The exhaustion of remedies requirement is one of the most important sections of the PLRA because so many prisoners lose their cases because they do not pursue all available administrative remedies to the end. You should refer to Chapter 14, Part E, of the main *JLM*, “The Prison Litigation Reform Act,” in order to learn about the general details of this requirement across the nation. This section will focus specifically on what the Fifth Circuit has held with regard to exhaustion of administrative remedies. Exhaustion of available administrative remedies is a threshold requirement for any Section 1983 action,<sup>64</sup> even if you are seeking monetary damages that would not be available in the prison grievance proceeding.<sup>65</sup>

When you file a complaint with the court, you do not immediately have to demonstrate that you have exhausted all possible administrative remedies.<sup>66</sup> Since failure to exhaust is an affirmative defense under the PLRA, it is up to the defendant to point out to the court that they believe you have not satisfied the exhaustion requirement.<sup>67</sup> Once the defendant has raised this defense, the Fifth Circuit has stated that the district court must give a prisoner an opportunity to show that he has either exhausted the available administrative remedies or that he should be excused from the requirement.<sup>68</sup>

The Fifth Circuit has held that the issue of exhaustion may be addressed by courts in summary judgment.<sup>69</sup> When a defendant claims that you have not exhausted your administrative remedies as an affirmative defense, the judge will usually resolve this dispute concerning exhaustion before discussing the merits of the case.<sup>70</sup> On appeal, the court will review rulings on exhaustion *de novo*, or as though the court is hearing it for the first time.<sup>71</sup>

### (a) What is Exhaustion?

If a prison or jail has a grievance process that involves multiple steps, you must comply with all of the steps before your administrative remedies will be considered exhausted.<sup>72</sup> In Louisiana, the DPSC and each sheriff may adopt an administrative procedure at each of their correctional institutions for receiving, hearing, and disposing of any complaints.<sup>73</sup> When you are seeking administrative remedies regarding prison

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<sup>63</sup> 42 U.S.C. § 1997e(a) (2012).

<sup>64</sup> *Johnson v. Louisiana ex rel. La. Dep't. of Pub. Safety and Corr.*, 468 F.3d 278, 280 (5th Cir. 2006) (per curiam) (holding that the PLRA's exhaustion requirement applies to all § 1983 claims regardless of whether the inmate files his claim in state or federal court).

<sup>65</sup> *Robinson v. Wheeler*, 338 F. App'x. 437, 438 (5th Cir. 2009) (per curiam); *see also* *Wright v. Hollingsworth*, 260 F.3d 357, 358 (5th Cir. 2001) (stating that an inmate must satisfy the exhaustion requirement regardless of the types of relief sought and offered through administrative sources).

<sup>66</sup> *Samuels v. Huff*, 344 F. App'x. 8, 10 (5th Cir. 2009) (per curiam) (finding that the district court erred in dismissing Samuels' claims for failure to provide proof that he had exhausted his administrative remedies as to the claims against the defendants).

<sup>67</sup> *Samuels v. Huff*, 344 F. App'x. 8, 10 (5th Cir. 2009); *see also* *Torns v. Miss. Dep't. of Corr.*, 301 F. App'x. 386, 389–390 (5th Cir. 2008) (holding that where the complaint does not clearly show that the inmate fails to exhaust administrative remedies, it is the defendant's job to raise and prove such affirmative defense); *Carbe v. Lappin*, 492 F.3d 325, 328 (5th Cir. 2007) (holding that a district court *cannot* require prisoners to affirmatively plead exhaustion).

<sup>68</sup> *Johnson v. Ford*, 261 F. App'x. 752, 755 (5th Cir. 2008) (per curiam) (stating that one possible excuse could be that administrative remedies are inadequate because prison officials have ignored or interfered with prisoner's pursuit of an administrative remedy; another possible excuse would be where dismissal would be inefficient and would not further the interest of justice or the purposes of the exhaustion requirement).

<sup>69</sup> *Dillon v. Rogers*, 596 F.3d 260, 272 (5th Cir. 2010) (holding that the District Court did not err in addressing appellees' affirmative defense of failure to exhaust on summary judgment).

<sup>70</sup> *Dillon v. Rogers*, 596 F.3d 260, 273 (5th Cir. 2010).

<sup>71</sup> *Powe v. Ennis*, 177 F.3d 393, 394 (5th Cir. 1999) (per curiam).

<sup>72</sup> *Hicks v. Tarrant Cty. Tex.*, 345 F. App'x. 911, 913 (5th Cir. 2009) (per curiam) (holding that Hicks' failure to comply with the second step in a two-step grievance procedure constituted a failure to exhaust his administrative remedies).

<sup>73</sup> LA. REV. STAT. ANN. §§ 15:1171–15:1178 (2017).

conditions, it is important for you do so in the proper form specified by the particular administration of your prison or you will not have satisfied the exhaustion requirement.<sup>74</sup> In general, you must use Louisiana's Administrative Remedy Procedure (ARP) before you can bring a case in federal court in Louisiana. ARP is discussed further in Section C(1)(c) of this Chapter.

The Fifth Circuit has held that if the named plaintiff in a class action has exhausted his administrative remedies, that is sufficient to satisfy the PLRA's exhaustion requirement.<sup>75</sup>

Available administrative remedies are considered to be exhausted when the time limits for the prison's response, stated in the grievance procedure rules, have expired.<sup>76</sup> After the time limit for the prison's response has expired, you should then proceed to the next step of the grievance process, if such grievance process has multiple steps.<sup>77</sup> Once you have reached the last step, if you do not receive a response from the prison within the time frame provided for by the grievance process, you may then file suit in court.<sup>78</sup>

(b) What administrative remedies are "available"?

In order to satisfy this exhaustion requirement, you need to know which administrative remedies are "available" to you. If you do not discover certain injuries until after you have left a certain prison, and that prison's administration lacks authority to hear your complaint after you have left, you will have no available administrative remedies to exhaust.<sup>79</sup>

The Fifth Circuit has acknowledged that one's personal inability to access the grievance system might make the system unavailable.<sup>80</sup> However, the court has not yet found any prisoner to be "unable" enough to make administrative remedies unavailable.<sup>81</sup> The Fifth Circuit has acknowledged a narrow set of facts where administrative remedies might be deemed "unavailable" due to physical injury: when (1) an prisoner's untimely filing of a grievance is because of a physical injury and (2) the grievance system rejects the prisoner's subsequent attempts to exhaust his remedies based on the untimely filing of the grievance.<sup>82</sup> Therefore, even if you are unable to file a complaint due to a physical injury, you are obligated to file one as

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<sup>74</sup> Robinson v. Wheeler, 338 F. App'x. 437, 438 (5th Cir. 2009) (per curiam) (finding that Robinson failed to exhaust his remedies when he did not resubmit individual claims after being informed that his first attempt to use the grievance process had been rejected because it presented multiple claims); Randle v. Woods, 299 F. App'x. 466, 467 (5th Cir. 2008) (per curiam) (holding that Randle had not properly exhausted his administrative remedies when he raised a specific complaint for the first time in step two of the grievance procedure, in violation of the requirement that each issue be filed at step one).

<sup>75</sup> Gates v. Cook, 376 F.3d 323, 329–330 (5th Cir. 2004).

<sup>76</sup> Underwood v. Wilson, 151 F.3d 292, 295 (5th Cir. 1998) *overruled on other grounds by* Carbe v. Lappin, 492 F.3d 325 (5th Cir. 2007) (finding that when the Texas Department of Criminal Justice, in a three-step grievance process, stated that the Deputy Director was to render a final decision within twenty-six days of receipt of the grievance, Underwood would have satisfied the exhaustion requirement if he had waited until after the twenty-six days to file suit).

<sup>77</sup> Clifford v. Louisiana, 347 F. App'x. 21, 22 (5th Cir. 2009) (per curiam) (holding that the expiration of time limits enables an inmate to proceed to the next step in the grievance process); Hicks v. Tarrant Cty. Tex., 345 F. App'x. 911, 912–913 (5th Cir. 2009) (per curiam).

<sup>78</sup> Underwood v. Wilson, 151 F.3d 292, 295 (5th Cir. 1998) *overruled on other grounds by* Carbe v. Lappin, 492 F.3d 325 (5th Cir. 2007).

<sup>79</sup> Allard v. Anderson, 260 F. App'x. 711, 714 (5th Cir. 2007) (per curiam) (finding that Allard did not discover certain injuries incurred until after he had been transferred and therefore any requirement that he exhaust available administrative remedies would be futile). *But see* Hill v. Epps, 169 F. App'x. 199, 200–201 (5th Cir. 2006) (per curiam) (holding that because Hill did not provide an explanation for failing to file a grievance complaint before he was transferred, he did not satisfy the exhaustion requirement).

<sup>80</sup> Days v. Johnson, 322 F.3d 863, 867 (5th Cir. 2003) (per curiam) *overruled by implication on other grounds by* Jones v. Bock, 549 U.S. 199, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007).

<sup>81</sup> Ferrington v. La. Dep't. of Corr., 315 F.3d 529, 532 (5th Cir. 2002) (per curiam) (finding that a prisoner's blindness did not make him unable to exhaust his available administrative remedies).

<sup>82</sup> Fontenot v. Global Expertise in Outsourcing, 232 F. App'x. 393, 394 (5th Cir. 2007) (per curiam) (stating that even if the administrative process was not available to the inmate while he could not find someone to assist him, he is not excused from the exhaustion requirement because he did not file a grievance after he found an inmate willing to assist him).

soon as you are able to.

## 2. Examples of Substantive Claims That Can Be Brought Under Section 1983

In the section above we have described some of the procedural hurdles that may affect your ability to bring a lawsuit for civil rights violations under federal law. In this section, we discuss some of the substantive claims that can be made in lawsuits complaining about a violation of federal law. The discussion in this section will focus on how the Fifth Circuit has decided cases brought under Section 1983.

In order to bring a lawsuit under Section 1983, you need to show that you have met the three essential requirements in your pleadings: (1) that a “person” violated your constitutional or federal statutory rights; (2) that that person acted “under color of” state law; and (3) that that person deprived you of a right, privilege, or immunity you have under the Constitution or federal law. For general information on Section 1983 claims across the country, you should refer to Chapter 16 of the main *JLM*. This section will focus on specific interpretations of the Fifth Circuit in order to supplement the information already supplied in the *JLM*. Therefore, it is very important that you look at Chapter 16 of the main *JLM* in order to gather information about your own Section 1983 claim.

This Chapter will primarily address rights under the Eighth and Fourteenth Amendments. For other constitutional rights, see the table below to identify which main *JLM* or *Louisiana State Supplement* Chapters you should consult:

| Type of Prisoner Rights                                    | Source of Constitutional Right    | <i>JLM</i> Chapter  | Louisiana Supplement Chapter |
|--|-----------------------------------|---|------------------------------|
| Mail, visitation, telephone use, and other communications  | First Amendment                   | Chapter 19, “Your Right to Communicate with the Outside World”  | Chapter 13                   |
| Religious practices  | First Amendment                   | Chapter 27, “Religious Freedom in Prison”   | Chapter 15                   |
| Searches and seizures of pretrial detainees; body searches | Fourth Amendment                  | Chapter 25, “Your Right to Be Free From Illegal Body Searches”  | Chapter 24                   |
| Prison conditions: overcrowding, cleanliness, etc.         | Eighth Amendment                  | Chapter 16, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law”                             | This Chapter, Chapter 6      |
| Medical care   | Eighth Amendment                  | Chapter 23, “Your Right to Adequate Medical Care”   | Chapter 14                   |
| Assault/failure to protect                                 | Eighth Amendment                  | Chapter 24, “Your Right to Be Free From Assault by Prison Guards and Other Prisoners”   | Chapter 7                    |
| Informational privacy                                      | Fourteenth Amendment              | Chapter 26, “Infectious Diseases: AIDS, Hepatitis, and Tuberculosis in Prison,” and Chapter 23, “Your Right to Adequate Medical Care” | Chapter 23, Chapter 14       |
| Due Process in disciplinary hearings                       | Due Process Clause of the Fifth & | Chapter 18, “Your Rights at Prison Disciplinary Proceedings”  | Chapter 11                   |

|  |   |   |                         |
|--|---|---|-------------------------|
|  | Fourteenth Amendments                               |   |                         |
| Discrimination on the basis of race, ethnicity, etc.                 | Equal Protection Clause of the Fourteenth Amendment | Chapter 16, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law” | This Chapter, Chapter 6 |
| Discrimination on the basis of gender                                | Equal Protection Clause of the Fourteenth Amendment | Chapter 16, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law” | This Chapter, Chapter 6 |
| Rights of prisoners with mental illness                              | Eighth and Fourteenth Amendments                    | Chapter 29, “Special Issues for Prisoners with Mental Illness”  | Chapter 16              |
| Discrimination on the basis of disability                            | Equal Protection Clause of the Fourteenth Amendment | Chapter 28, “Rights of Prisoners with Disabilities”   | This Chapter, Chapter 6 |
| Discrimination on the basis of sexual orientation or gender identity | Equal Protection Clause of the Fourteenth Amendment | Chapter 30, “Special Information for Lesbian, Gay, Bisexual, and Transgender Prisoners”                   | This Chapter, Chapter 6 |
| Access to courts—law libraries or legal assistance                   | First, Sixth, & Fourteenth Amendments               | Chapter 3, “Your Right to Learn the Law and Go to Court”  |                         |

#### a. Stating a Claim

To state a Section 1983 claim, you must show two things: (1) You must allege a violation of rights secured by the Constitution or a federal statute and (2) you must demonstrate that the alleged deprivation was committed by a person acting under color of law.<sup>83</sup> The Fifth Circuit has stated that “[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of’ state law.”<sup>84</sup> This means that when an official misuses his power and violates your rights, this counts as acting “under color” of law. Whether an official is acting “under color” of law does not depend on his duty status at the time of the alleged violation.<sup>85</sup> Thus, it does not matter whether the official was actually working on duty when he violated your rights.

Congress did not provide a statute of limitations for Section 1983 cases, and so federal courts borrow from the state’s statute of limitations for similar situations.<sup>86</sup> In Louisiana, the statutory limitation period for tort claims is one year from the day that the action accrues (happens), and the Fifth Circuit has held that the statute of limitations for torts applies to Section 1983 actions.<sup>87</sup> What this means is that you have

<sup>83</sup> *Piotrowski v. City of Houston*, 51 F.3d 512, 515–516 (5th Cir. 1995) (holding that the plaintiff failed to allege facts supporting a § 1983 claim against the city).

<sup>84</sup> *Townsend v. Moya*, 291 F.3d 859, 861 (5th Cir. 2002) (per curiam) (quoting *United States v. Causey*, 185 F.3d 407, 415 (5th Cir. 1999)) (finding that when an inmate engaged in horseplay with the defendant and the defendant stabbed the inmate in the process, the defendant was not acting “under color” of law).

<sup>85</sup> *United States v. Tarpley*, 945 F.2d 806, 809 (5th Cir. 1991) (finding that a police officer was acting “under color” of law when he assaulted his wife’s former lover since he claimed during the assault to have special authority for his actions by virtue of his official stature and that he could kill the victim because he was an officer of the law).

<sup>86</sup> *Bourdais v. New Orleans City*, 485 F.3d 294, 298 (5th Cir. 2007) (citing *Pegues v. Morehouse Parish Sch. Bd.*, 632 F.2d 1279, 1280–1281 (5th Cir. 1980)).

<sup>87</sup> *Bourdais v. New Orleans City*, 485 F.3d 294, 298 (5th Cir. 2007) (citing *Pegues v. Morehouse Parish Sch. Bd.*, 632 F.2d 1279, 1280–1281 (5th Cir. 1980)); LA. CIV. CODE ANN. art. 3492 (2017).



one year to file the claim from the moment the injury or damage occurs.<sup>88</sup> There can be an exception to the time limit if: 1) there was some legal cause that prevented the court from taking action on your case, 2) there was some condition along with a contract or some connection to your claim that prevented you from suing, 3) the defendant has done some act to prevent you from bringing a case, or 4) you do not have sufficient information to know or reasonably know that you have been injured, even if this is not the defendant's fault.<sup>89</sup> If your injury is related to a violation of a contract, the limitation period will be 10 years from the day that the injury occurs.<sup>90</sup>

As stated above, in order to state a Section 1983 claim, you have to demonstrate that a violation of your constitutional or statutory rights has occurred. The Fifth Circuit has discussed several rights in particular, which are listed below.

#### b. Eighth Amendment

The Eighth Amendment of the Constitution prohibits "cruel and unusual punishments."<sup>91</sup> There are several types of claims courts will consider under the cruel and unusual punishment part of the Eighth Amendment. These claims include harm resulting from prison conditions, inadequate medical care, and assault. To state a viable Eighth Amendment claim, you must allege an injury in your complaint.<sup>92</sup> This means that you must describe how you have been harmed by the poor prison conditions. Claims of strip searches or body cavity searches should be brought under the Fourth Amendment, not the Eighth Amendment.<sup>93</sup> For more information, see Chapter 24 of the *Louisiana State Supplement*.

You should read Chapter 14 of the main *JLM*, "The Prison Litigation Reform Act" ("PLRA"), if you plan to file a claim for cruel and unusual punishment under the Eighth Amendment. The PLRA prohibits federal lawsuits by prisoners for compensatory damages<sup>94</sup> for mental or emotional injury without accompanying physical injury or sexual acts.<sup>95</sup>

To make a Section 1983 claim under the Eighth Amendment, the Fifth Circuit requires that you classify your challenge either as an attack on a condition of confinement or as a complaint against an episodic act or omission.<sup>96</sup> You cannot bring both claims and they each have a different standard of review, so it is important to know which claim fits your situation better. A condition-of-confinement claim is a constitutional attack on the general conditions, practices, rules, or restrictions of confinement.<sup>97</sup> An episodic-act-or-omission claim occurs when the complained-of harm is a particular act or omission of one or more

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<sup>88</sup> LA. CIV. CODE ANN. art. 3492 (2017).

<sup>89</sup> *Terrebonne Parish School Bd. v. Mobil Oil Corp.*, 310 F.3d 870, 884 n.37 (5th Cir. 2002).

<sup>90</sup> LA. CIV. CODE ANN. art. 3499 (2017).

<sup>91</sup> U.S. CONST. amend. VIII.

<sup>92</sup> *Johnson v. Tex. Bd. of Criminal Justice*, 281 F. App'x. 319, 321 (5th Cir. 2008).

<sup>93</sup> *Waddleton v. Jackson*, 445 F. App'x. 808, 808 (5th Cir. 2011) (per curiam) ("In this circuit, such claims are properly considered under the Fourth Amendment.") (citing *Moore v. Carwell*, 168 F.3d 234, 235 (5th Cir. 1999)); *Elliott v. Lynn*, 38 F.3d 188, 191 n.3 (5th Cir. 1994) (citing *United States v. Lilly*, 576 F.2d 1240, 1244 (5th Cir. 1978) (noting that "*Lilly* is still the law of this circuit concerning the Fourth Amendment's application to visual body cavity searches in the prison setting").

<sup>94</sup> Compensatory damages repay you for damages you have already sustained, like the cost of medical bills. Compensatory damages do not include punitive damages, which are meant to punish the wrongdoer rather than to compensate you for your injuries.

<sup>95</sup> 42 U.S.C. § 1997e(e) (2012). The statute states that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act." Courts have held that the statute only prohibits compensatory damages for mental or emotional injury, so prisoners can still claim injunctive relief or other forms of damages for emotional injuries.

<sup>96</sup> *Anderson v. Dallas Cty. Tex.*, 286 F. App'x. 850, 857 (5th Cir. 2008) (per curiam) (citing *Flores v. Cty. of Hardeman*, 124 F.3d 736, 738 (5th Cir. 1997)).

<sup>97</sup> *Anderson v. Dallas Cty. Tex.*, 286 F. App'x. 850, 857 (5th Cir. 2008) (per curiam) (citing *Bradley v. Puckett*, 157 F.3d 1022, 1025 (5th Cir. 1998) as an example of a condition-of-confinement case because a disabled prisoner complained that he was unable to bathe for over two months, as the prison did not accommodate his disability).

officials.<sup>98</sup> In the episodic-act-or-omission cases, you will usually complain first about a particular act or omission of an officer and then point to a policy, custom, or rule of the municipality that permitted or caused the action.<sup>99</sup> The reason that you need to distinguish between these two different types of claims is that the Fifth Circuit will not allow you to proceed with your case under both theories.<sup>100</sup> It is also important to include as many details as possible in your complaint. If your allegations are “too vague and conclusory,” the claim will be dismissed.<sup>101</sup>

i. *Condition of Confinement*

In condition-of-confinement cases, the Fifth Circuit has held that a prisoner must satisfy two requirements to demonstrate that a prison official has violated the Eighth Amendment: (1) the prison official’s act or omission must result in the denial of “the minimal civilized measure of life’s necessities,” and (2) the prison official must have been deliberately indifferent to the prisoner’s health or safety.<sup>102</sup> The “minimal civilized measure” requirement is an *objective* test; the “deliberate indifference” requirement is a *subjective* test.

(a) Minimal Civilized Measure

The Fifth Circuit has defined what constitutes “the minimal civilized measure of life’s necessities.” The court has also phrased the requirement as “[c]onditions posing a substantial risk of serious harm to the inmate.”<sup>103</sup> In *Palmer v. Johnson*,<sup>104</sup> the Fifth Circuit discussed this objective requirement for prison conditions at length. The Court stated that missing the occasional meal or two and enduring insect bites without immediate medical attention did not rise to the level of constitutional injury.<sup>105</sup> However, if you are denied the basic elements of hygiene, then your prison conditions will be considered so base and inhumane that they violate the Eighth Amendment.<sup>106</sup> In *Palmer*, the plaintiff was deprived of toilets along with forty-eight other prisoners in a small area. This was considered to be a deprivation of basic requirements of hygiene, and therefore a violation of constitutional rights under the Eighth Amendment.<sup>107</sup> In *Palmer*, the Fifth Circuit emphasized that the court must consider the totality of the specific circumstances, even where the challenged conduct only lasted for seventeen hours.<sup>108</sup>

In Eighth Amendment cases such as *Palmer*, where the claim does not involve “significant risks to the rights of inmates and prison staffs,” you will also need to demonstrate that the infliction of pain was

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<sup>98</sup> Anderson, 286 F. App’x. 850, 859 (5th Cir. 2008) (per curiam) (finding that this case was an episodic-act-or-omission case because the plaintiff admitted that the defendant had policies in place that would have prevented the prisoner’s suicide if they had been followed).

<sup>99</sup> Anderson, 286 F. App’x. 850, 859 (5th Cir. 2008) (per curiam) (citing Scott v. Moore, 114 F.3d 51, 53 (5th Cir. 1997)).

<sup>100</sup> Anderson, 286 F. App’x. 850, 857–858 (5th Cir. 2008) (per curiam); Flores v. Cty. of Hardeman, Tex., 124 F.3d 736, 738 (5th Cir. 1997).

<sup>101</sup> Johnson v. Tex. Bd. of Criminal Justice, 281 F. App’x. 319, 321 (5th Cir. 2008).

<sup>102</sup> Gates v. Cook, 376 F.3d 323, 332 (5th Cir. 2004) (quoting Davis v. Scott, 157 F.3d 1003, 1006 (5th Cir. 1998)); see Helling v. McKinney, 509 U.S. 25, 31 (1993) (“The treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.”).

<sup>103</sup> Gates v. Cook, 376 F.3d 323, 333 (5th Cir. 2004).

<sup>104</sup> Palmer v. Johnson, 193 F.3d 346, 351–352 (5th Cir. 1999).

<sup>105</sup> Palmer v. Johnson, 193 F.3d 346, 352 (5th Cir. 1999) (citing Talib v. Gilley, 138 F.3d 211, 214 n.3 (5th Cir. 1998)). (“[M]issing a mere one out of every nine meals is hardly more than that missed by many working citizens over the same period.”).

<sup>106</sup> Novak v. Beto, 453 F.2d 661, 665–666 (5th Cir. 1971) (finding that where the solitary confinement cells were scrubbed each time the prisoner left to bathe and contained flush toilets, a drinking fountain, and a bunk, there was no Eighth Amendment violation).

<sup>107</sup> Palmer v. Johnson, 193 F.3d 346, 352 (5th Cir. 1999).

<sup>108</sup> Palmer v. Johnson, 193 F.3d 346, 353 (5th Cir. 1999) (finding that “the totality of the specific circumstances presented by Palmer’s claim—his overnight outdoor confinement with no shelter, jacket, blanket, or source of heat as the temperature dropped and the wind blew along with the total lack of bathroom facilities for forty-nine inmates sharing a small bounded area—constituted a denial of ‘the minimal civilized measure of life’s necessities’”) (quoting Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d 811, 823 (1994)).

“unnecessary and wanton.”<sup>109</sup> This means that the court will ask whether the officer's actions were applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm.<sup>110</sup> This can often be difficult to prove.

The Fifth Circuit has found “the minimal civilized measure of life's necessities” to include “food, clothing, shelter, medical care, and reasonable safety.”<sup>111</sup> It also includes protection from things like excessive heat,<sup>112</sup> excessive cold,<sup>113</sup> and filthy prison conditions.<sup>114</sup> It is important to note that comfort alone is not protected by the Eighth Amendment. For example, the “[l]ack of space alone does not constitute cruel and unusual punishment, save perhaps in the most aggravated circumstances.”<sup>115</sup> However, lack of space or lack of comfort can be considered in light of other conditions, including “sanitation, provision of security, protection against prisoner violence, and time and facilities available for work and exercise.”<sup>116</sup>

Medical conditions may also provide grounds for a claim under the Eighth Amendment. For example, inappropriate work requirements in light of medical conditions may provide the basis for a claim, but only if the deliberate indifference element is proved.<sup>117</sup> In some circumstances, inadequate medical treatment or neglect can violate the Eighth Amendment.<sup>118</sup> An incorrect diagnosis by prison officials, however, does not violate the Eighth Amendment.<sup>119</sup> For more information, see Chapter 23 of the main *JLM*, “Your Right to Adequate Medical Care.”

In “condition-of-confinement” cases, you can combine conditions to prove an Eighth Amendment violation, but only where each of the conditions affect a “single, identifiable human need.”<sup>120</sup> For example, cold cell temperatures combined with failure to issue blankets might combine to reach an Eighth Amendment violation, because they both affect the same need—warmth.

#### (b) Deliberate Indifference

Deliberate indifference happens when prison officials “(1) [are] aware of facts from which an inference of an excessive risk to the prisoner's health or safety could be drawn and (2) . . . actually [draw] an inference that such potential for harm existed.”<sup>121</sup> Thus, you need to show that (1) prison officials knew of conditions that were highly risky to health or safety. After you do that, you also must show that (2) the officials knew the risky conditions could cause you harm.

<sup>109</sup> *Beck v. Lynaugh*, 842 F.2d 759, 761 (5th Cir. 1988) (quoting *Foulds v. Corley*, 833 F.2d 52, 54–55 (5th Cir. 1987)) (finding that the standard of malicious and sadistic intent was not the proper standard in cases where there is no imminent danger) (internal quotation marks omitted).

<sup>110</sup> *Petta v. Rivera*, 143 F.3d 895, 901 (5th Cir. 1998). In this case, the plaintiffs had to prove “that [the officer's] actions caused them any injury, were grossly disproportionate to the need for action under the circumstances and were inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience.” *Petta v. Rivera*, 143 F.3d 895, 902 (5th Cir. 1998).

<sup>111</sup> *Shepherd v. Dallas Cty.*, 591 F.3d 445, 454 (5th Cir. 2009) (quoting *Hare v. City of Corinth*, 74 F.3d 633, 639 (5th Cir. 1996)).

<sup>112</sup> *Valigura v. Mendoza*, 265 F. App'x. 232, 235 (5th Cir. 2008) (per curiam); *Gates v. Cook*, 376 F.3d 323, 339 (5th Cir. 2004).

<sup>113</sup> *Taylor v. Woods*, 211 F. App'x. 240, 241 (5th Cir. 2006) (per curiam).

<sup>114</sup> *Gates v. Cook*, 376 F.3d 323, 338 (5th Cir. 2004); *Harper v. Showers*, 174 F.3d 716, 720 (5th Cir. 1999).

<sup>115</sup> *Ruiz v. Estelle*, 666 F.2d 854, 858 (5th Cir. 1982).

<sup>116</sup> *Ruiz v. Estelle*, 666 F.2d 854, 858 (5th Cir. 1982).

<sup>117</sup> *Hicks v. Shaw*, 39 F.3d 319 (5th Cir. 1994) (per curiam) (unpublished).

<sup>118</sup> *Estelle v. Gamble*, 429 U.S. 97, 104–106, 97 S. Ct. 285, 291–292, 50 L. Ed. 2d 251, 260–261 (1976) (holding that deliberate indifference to a prisoner's serious medical needs constitutes an Eighth Amendment violation).

<sup>119</sup> *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985); see also *Norton v. Dimazana*, 122 F.3d 286, 292 (5th Cir. 1997) (“Disagreement with medical treatment does not state a claim for Eighth Amendment indifference to medical needs.”).

<sup>120</sup> *Wilson v. Seiter*, 501 U.S. 294, 304, 111 S. Ct. 2321, 2327, 115 L. Ed. 2d 271, 283 (1991) (“Some conditions of confinement may establish an Eighth Amendment violation ‘in combination’ when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need . . .”).

<sup>121</sup> *Bradley v. Puckett*, 157 F.3d 1022, 1025 (5th Cir. 1998); see also *Farmer v. Brennan*, 511 U.S. 825, 829, 834–837, 114 S. Ct. 1970, 1974, 1977–1979, 128 L. Ed. 2d 811, 820, 824–827 (1994) (requiring “a showing that the official was subjectively aware of the risk [of serious harm to the prisoner]”).

Deliberate indifference is an “extremely high” standard to meet.<sup>122</sup> You must show that prison officials (1) “refused to treat [you],” (2) “ignored [your] complaints,” (3) “intentionally treated [you] incorrectly,” or (4) “engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs.”<sup>123</sup> “Wanton disregard” means that officials were more than just careless. Mere negligence does not amount to deliberate indifference.<sup>124</sup> In other words, even if the official was careless in his actions or should have known better, that does not mean the official was acting with deliberate indifference. When your complaint is about medical care, unsuccessful medical treatment or medical malpractice does not amount to deliberate indifference.<sup>125</sup> Therefore, even if your doctor or medical official did not follow the rules of their profession and you were injured as a result, your claim still does not necessarily reach the level of deliberate indifference.

## ii. *Episodic Act or Omission*

There are two steps to episodic-act-or-omission cases. You must show that the prison employee “(1) violated [your] clearly established constitutional rights with subjective deliberate indifference.” You also must show that, “(2) the violation resulted from a municipal policy or custom adopted or maintained with objective deliberate indifference.”<sup>126</sup> The core of this requirement is that “the prison official had knowledge of the risk faced by inmates and responded unreasonably.”<sup>127</sup>

First, you must demonstrate that the prison employee acted with deliberate indifference, as discussed above.<sup>128</sup> After you have proven subjective deliberate indifference, you must still show that the employee’s act resulted from a policy adopted or maintained with objective deliberate indifference to your rights.<sup>129</sup> That means that the city or county must have a policy (or lack of policy) that it knew or should have known would lead to an Eighth Amendment violation.<sup>130</sup> There must be a causal link between the municipal policy and the act/omission of the official. The policy or custom must have been the “moving force” behind the constitutional violation.<sup>131</sup>

If prison officials fail to protect you from assault by other prisoners, you may also make a claim that your Eighth Amendment rights have been violated. For more information on your right to be free from assault generally, see Chapter 24 of the main *JLM*, “Your Right to Be Free from Assault by Prison Guards and Other Prisoners,” and Chapter 7 of the *Louisiana State Supplement*.

## c. Fourteenth Amendment—Due Process Clause

The Due Process Clause of the Fourteenth Amendment says that the state cannot “deprive any person of life, liberty, or property without due process of law.”<sup>132</sup> Courts have said that this creates two

<sup>122</sup> *Gobert v. Caldwell*, 463 F.3d 339, 346 (5th Cir. 2006) (quoting *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985) (internal quotation marks omitted)).

<sup>123</sup> *Domino v. Tex. Dep’t. of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001) (quoting *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985)).

<sup>124</sup> *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991) (per curiam).

<sup>125</sup> *Gobert v. Caldwell*, 463 F.3d 339, 346 (5th Cir. 2006).

<sup>126</sup> *Flores v. Cty. of Hardeman, Tex.*, 124 F.3d 736, 738 (5th Cir. 1997); see also *Scott v. Moore*, 114 F.3d 51, 54 (5th Cir. 1997) (finding that a city was not liable for sexual assaults by a jailer even though different staffing policies could have prevented the assaults because the city did not have actual knowledge of the risk their policies posed).

<sup>127</sup> *Morgan v. Hubert*, 459 F. App’x. 321, 326 (5th Cir. 2012).

<sup>128</sup> *Anderson v. Dallas Cty. Tex.*, 286 F. App’x. 850, 860 (5th Cir. 2008) (citing *Scott v. Moore*, 114 F.3d 51, 54 (5th Cir. 1997)).

<sup>129</sup> *Anderson v. Dallas Cty. Tex.*, 286 F. App’x. 850, 860 (5th Cir. 2008).

<sup>130</sup> “A county acts with objective deliberate indifference if it promulgates (or fails to promulgate) a policy or custom despite ‘the known or obvious consequences’ that constitutional violations would result.” *Anderson v. Dallas Cty. Tex.*, 286 F. App’x. 850, 860 (5th Cir. 2008) (quoting *Piotrowski v. City of Houston*, 237 F.3d 567, 579 (5th Cir. 2001)).

<sup>131</sup> *Forgan v. Howard Cty. Tex.*, 494 F.3d 518, 522 (5th Cir. 2007) (citing *Monell v. Dep’t. of Soc. Servs.*, 436 U.S. 658, 690–691, 98 S. Ct. 2018, 2044–2045, 56 L. Ed. 2d 611, 635–636 (1978)).

<sup>132</sup> U.S. CONST. amend. XIV, § 1. The 14th Amendment applies to state government action. The 5th Amendment contains an identical prohibition: “No person shall be . . . deprived of life, liberty, or property, without due process of

separate types of protections: “substantive due process” and “procedural due process.”

i. *Substantive Due Process*

The substantive aspect of the Due Process Clause prevents the government from interfering with your fundamental individual rights in a way that is not “reasonably related to legitimate penological interests.”<sup>133</sup> These fundamental rights include the right to bodily privacy, the right to informational privacy and confidentiality, the right to get married, and the right to refuse medical or psychiatric treatment. The protection has limits, however. In order to show your right has been violated, you must show that the government did not act in a way that is reasonably related to a legitimate goal. For example, the Fifth Circuit has held that a prison’s interest in preventing the spread of tuberculosis, a highly contagious and dangerous disease, was compelling and thus a prisoner being forcibly medicated against tuberculosis was constitutional.<sup>134</sup> If you are challenging a “specific act of a governmental officer,” you must show that the behavior of the governmental officer is so outrageous that it is “conscience shocking.”<sup>135</sup> For more information on substantive due process violations see Chapter 16 of the main *JLM*, Part B(2)(e).

ii. *Procedural Due Process*

You have a right to procedural due process under the Fourteenth Amendment. This means that the government cannot deprive you of life, liberty, or property without going through certain procedures (“due process”). In order to argue that your procedural due process rights were violated, you must show two things. First, you must show that you have been deprived of either liberty or property. Second, you must show that the deprivation happened without procedural protection.<sup>136</sup>

Showing that you were deprived of liberty or property means showing that either your property or your liberty was taken from you *in a way that is not typical of prison life*.<sup>137</sup> You must also show that the prison officials’ action was not accidental or simply careless.<sup>138</sup>

The Fifth Circuit has observed that the liberty interests protected by the Due Process Clause are “generally limited to state created regulations or statutes which affect the *quantity of time* rather than

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law” and applies to the federal government. U.S. CONST. amend. V. Federal prisoners therefore usually use the 5th Amendment instead of the 14th Amendment to challenge due process violations.

<sup>133</sup> *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) (finding that prison regulations that affect constitutional rights can only be upheld if they have a rational connection to a legitimate government interest); *see also* *Washington v. Harper*, 494 U.S. 210, 224–225, 110 S. Ct. 1028, 1038–1039, 108 L. Ed. 2d 178, 200–201 (1990) (reasoning that the right to be free of psychotropic medication had to be balanced against the state’s duty to treat mentally-ill prisoners and run a safe prison).

<sup>134</sup> *McCormick v. Stalder*, 105 F.3d 1059, 1061–1062 (5th Cir. 1997).

<sup>135</sup> *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847, 118 S. Ct. 1708, 1717, 140 L. Ed. 2d 1043, 1058 (1998); *McClendon v. City of Columbia*, 305 F.3d 314, 326 (5th Cir. 2002).

<sup>136</sup> Procedural protection refers to the requirements and safeguards of adequate due process. These safeguards include the right to a hearing, the right to counsel, and an opportunity to speak in one’s own defense, all of which serve to protect the prisoner or the accused. *See, e.g., Sandin v. Connor*, 515 U.S. 472, 487, 115 S. Ct. 2293, 2302, 132 L. Ed. 2d 418, 432 (1995) (holding that a parole hearing to explain the circumstances behind a prisoner’s misconduct record sufficed to afford “procedural protection” for a parole board’s decision not to grant parole); *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 2976, 41 L. Ed. 2d 935, 952 (1974) (holding that the determination of prisoners’ guilt of “serious misconduct,” for which they could lose “good-time credits,” requires some sort of hearing to safeguard the minimum requirements of procedural due process). You should be aware that the Court’s discussion of due process requirements for solitary confinement in *Wolff* is *not* good law. *See Sandin v. Connor*, 515 U.S. 472, 486, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418, 431 (1995) (holding that solitary confinement “did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest”).

<sup>137</sup> *See Sandin v. Connor*, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995) (finding that due process liberty interests created by prison regulations will generally be limited to freedom from restraints that impose an atypical and significant hardship on the prisoner in relation to the ordinary incidents of prison life).

<sup>138</sup> *See Daniels v. Williams*, 474 U.S. 327, 331–332, 106 S. Ct. 662, 664–665, 88 L. Ed. 2d 662, 668 (1986) (finding that negligently leaving a pillowcase on the stairs which caused an inmate to trip was not enough to constitute a violation under the Due Process Clause).

the *quality of time* served by a prisoner.”<sup>139</sup> Thus, if you have a complaint about a rule that will affect how long you are incarcerated, then you may have a procedural due process claim, but if the rule only concerns issues within prison, you will likely not have a claim. The Due Process clause does not, by itself, give you a protected liberty interest in the location of your confinement.<sup>140</sup> Additionally, you have no liberty interest in being housed in any particular facility.<sup>141</sup> Classification of inmates in Louisiana is a duty of the DPSC and you do not have a right to a particular classification under state law.<sup>142</sup> The Fifth Circuit has also held that you do not have a liberty interest entitled to due process protection in whether or not you can participate in Louisiana’s work-release program.<sup>143</sup>

#### d. Fourteenth Amendment—Equal Protection Clause

Under the Equal Protection Clause of the Fourteenth Amendment, all persons in the United States, including prisoners, are guaranteed “the equal protection of the laws.”<sup>144</sup> This means that the state may not treat you differently or discriminate against you because you belong to a particular group or “class” of people. In general, for a prisoner to make a claim under the Equal Protection Clause, the claim has to meet two requirements. First, your claim must state that you were treated differently from other prisoners who were in a similar situation or similar circumstances. Second, it must state that the unequal treatment resulted from intentional or purposeful discrimination.<sup>145</sup> You are most likely to be able to make an equal protection claim if you have been discriminated against because of your race,<sup>146</sup> gender,<sup>147</sup> ethnicity, or disability.<sup>148</sup>

To state an equal protection claim, you must allege that “similarly situated” individuals have been treated differently.<sup>149</sup> However, if legitimate penological (prison-related) goals can rationally be said to support the decision to treat a particular group of prisoners differently, then that group is not considered “similarly situated” for Equal Protection purposes.<sup>150</sup> Like other constitutional rights, the right to equal protection is balanced against the state’s legitimate interests. One of these legitimate interests is keeping prisons safe and orderly.<sup>151</sup>

<sup>139</sup> *Madison v. Parker*, 104 F.3d 765, 767 (5th Cir. 1997) (emphasis added).

<sup>140</sup> *See Meachum v. Fano*, 427 U.S. 215, 225, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451, 459 (1976).

<sup>141</sup> *Olim v. Wakinekona*, 461 U.S. 238, 244–245, 103 S. Ct. 1741, 1745, 75 L. Ed. 2d 813, 819–820 (1983); *Tighe v. Wall*, 100 F.3d 41, 42 (5th Cir. 1996) (per curiam).

<sup>142</sup> *Woods v. Edwards*, 51 F.3d 577, 581–582 (5th Cir. 1995) (per curiam) (quoting *Wilkerson v. Maggio*, 703 F.2d 909, 911 (5th Cir. 1983)).

<sup>143</sup> *James v. Hertzog*, 415 F. App’x. 530, 532 (5th Cir. 2011) (per curiam) (finding the work release program grants administrative discretion and where there is administrative discretion, the government has not conferred a right on the prisoner).

<sup>144</sup> U.S. CONST. amend. XIV, § 1.

<sup>145</sup> *McCleskey v. Kemp*, 481 U.S. 279, 292, 107 S. Ct. 1756, 1767, 95 L. Ed. 2d 262, 278 (1987) (noting that a successful equal protection claim must prove that there was purposeful discrimination); *see Lavernia v. Lynaugh*, 845 F.2d 493, 496 (5th Cir. 1988) (“Discriminatory purpose . . . implies that the decisionmaker singled out a particular group for disparate treatment and selected his course of action at least in part for *the purpose* of causing its adverse effect on an identifiable group.” (internal quotation marks omitted)). This means that it is not enough to argue that you received different treatment, but that you must also argue that you were intentionally treated differently (on purpose).

<sup>146</sup> *See Johnson v. California*, 543 U.S. 499, 512, 125 S. Ct. 1141, 1150, 160 L. Ed. 2d 949, 963 (2005) (finding that a prisoner’s 14th Amendment rights to equal protection are violated if the prison discriminates on the basis of race, unless the prison can demonstrate that such discrimination is necessary in order to achieve a compelling government interest); *Sockwell v. Phelps*, 20 F.3d 187, 191 (5th Cir. 1994) (finding equal protection violation where prisoners were segregated by race in their cells, because a general fear of racial violence could not justify segregation).

<sup>147</sup> *See* Chapter 41 of the main *JLM*, “Special Issues of Women Prisoners,” for more information on and cases regarding equal protection violations based on gender.

<sup>148</sup> *See, e.g., Green v. McKaskle*, 788 F.2d 1116, 1125 (5th Cir. 1986) (noting restrictions on movement and access based on disability may violate equal protection if no possible justification is shown). *See* Chapter 28 of the main *JLM*, “Rights of Prisoners with Disabilities,” for more information on disability discrimination.

<sup>149</sup> *See Muhammad v. Lynaugh*, 966 F.2d 901, 903 (5th Cir. 1992) (comparing the treatment of a prisoner in a special housing unit with the treatment of other prisoners in that unit, rather than with prisoners in different units with different rules).

<sup>150</sup> *Yates v. Stalder*, 217 F.3d 332, 334–335 (5th Cir. 2000) (per curiam) (finding that male and female prisoners may be treated differently if rationally related to legitimate penological goal).

<sup>151</sup> *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

You may also have an equal protection claim if you are discriminated against because of your custodial status (the type of custody you are in, such as protective custody, general population, etc.). However, in practice, equal protection claims for discrimination based on custodial status are difficult to win. This is because treating different types of prisoners in different ways is allowed as long as the prison has some reasonable explanation.

To state an equal protection claim using Section 1983, you must claim that a state actor intentionally discriminated against you because you are a member of a protected class.<sup>152</sup> The Supreme Court has not recognized sexual orientation as a suspect class. Thus, in the Fifth Circuit, if the state violates the Equal Protection Clause by creating a disadvantage for you because of your sexual orientation, the state's conduct must have a "rational relationship to legitimate governmental aims."<sup>153</sup> The Supreme Court has also recognized that it may be possible to make an equal protection claim if you are singled out as an individual for arbitrary and irrational treatment, even if you are not being discriminated against as a member of a certain group.<sup>154</sup>

### C. ACTIONS FOR VIOLATIONS OF LOUISIANA STATE LAW

#### 1. Procedural Hurdles

This section discusses several procedural hurdles that you must be aware of before you bring a suit in Louisiana state court. It focuses on state immunities, the Louisiana Prison Litigation Reform Act, and the Louisiana Administrative Review Procedure.

##### a. Immunities

Under the Louisiana Constitution, there is a waiver of sovereign immunity in certain situations.<sup>155</sup> Section 10(A) of the Louisiana Constitution waives immunity for the state, state agencies, and political subdivisions in contract cases and in tort cases (cases where there has been injury to a person or property).<sup>156</sup> Section 10(B) also allows the legislature to authorize suits, and thus waive immunity, against the state, state agencies, and political subdivisions.<sup>157</sup> However, Section 10(C) limits the constitutional waiver by saying the legislature can limit the state's liability in any case and that no public property or funds can be taken as damages in a case against the state.<sup>158</sup>

Qualified immunity for public entities and employees is codified in Section 2798.1 of the Louisiana Revised Statutes.<sup>159</sup> Under this statute, public entities and employees are not liable when they exercise policymaking or discretionary acts within the scope of their lawful powers and duties.<sup>160</sup> Thus, first the court will determine whether a statute, regulation, or policy specifically lays out the course of action for the employee or the entity to take.<sup>161</sup> If there is such a guideline, then the employee or entity does not have to use their own judgement and thus there is no immunity.<sup>162</sup> However, there is immunity when there is a discretionary act, or an officer or employee of the public entity in question is exercising a policy making

<sup>152</sup> *Williams v. Bramer*, 180 F.3d 699, 705 (5th Cir. 1999).

<sup>153</sup> *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004). For more information on discrimination based on sexual orientation, see Chapter 30 of the main *JLM*, "Special Issues for Lesbian, Gay, Bisexual, and Transgender Prisoners."

<sup>154</sup> *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 1074–1075, 145 L. Ed. 2d 1060, 1063 (2000) (per curiam) (finding that equal protection claims can be made by a "class of one" if the plaintiff has been arbitrarily and irrationally singled out and treated differently from others in similar situations and there is no rational basis for the difference in treatment). But note, however, that a "class-of-one" claim is subject only to rational basis scrutiny, unless you are a member of a protected class. See *Unruh v. Moore*, 326 F. App'x. 770, 772 (5th Cir. 2009) (per curiam).

<sup>155</sup> LA. CONST. art. XII, § 10.

<sup>156</sup> LA. CONST. art. XII, § 10(A). For more information on tort claims, see Chapter 10 of the *Louisiana State Supplement*—"Tort Actions."

<sup>157</sup> LA. CONST. art. XII, § 10(B).

<sup>158</sup> LA. CONST. art. XII, § 10(C).

<sup>159</sup> LA. REV. STAT. ANN. § 9:2798.1 (2017).

<sup>160</sup> LA. REV. STAT. ANN. § 9:2798.1(B) (2017).

<sup>161</sup> *Simeon v. Doe*, 618 So. 2d 848, 852–853 (La. 1993).

<sup>162</sup> *Simeon v. Doe*, 618 So. 2d 848, 852–853 (La. 1993).

function. In such cases, 2798.1 orders that the public entity be immune from liability related to those acts particularly where “[n]o statutes, regulations, or other legal requirements directed” the actions of the entity’s agent.<sup>163</sup> Discretionary acts may include a broad range of conduct that is not strictly limited to acts grounded in social, economic, or political policy concerns.<sup>164</sup>

Louisiana follows the principles of judicial immunity set out by the United States Supreme Court.<sup>165</sup> In deciding whether or not to apply quasi-judicial immunity (“judge-like”), Louisiana courts apply a functional test. Instead of focusing on the identity of the official, they consider whether that official’s conduct is similar to that of the delegating or appointing judge.<sup>166</sup> If the courts find that the conduct *is* similar to the judge, the official will have “derived judicial immunity.” This means that every action taken with respect to that judicial conduct will be protected from liability—whether good or bad, honest or dishonest.<sup>167</sup>

#### b. Louisiana Prison Litigation Reform Act

This section addresses Louisiana’s Prison Litigation Reform Act and *in forma pauperis* suits.<sup>168</sup> The Louisiana Prison Litigation Reform Act requires exhaustion (using up) of administrative remedies,<sup>169</sup> includes a three strikes provision,<sup>170</sup> and limits the type of relief a prisoner can seek.<sup>171</sup>

In Louisiana, *in forma pauperis* is contained in Articles 5181 through 5188 of the Louisiana Civil Code of Procedure.<sup>172</sup> You can proceed *in forma pauperis* if you are “unable to pay the costs of court because of [your] poverty and lack of means.”<sup>173</sup> If you wish to bring a claim *in forma pauperis*, you must apply for permission from the court and you must complete the “In Forma Pauperis Affidavit” to your pleading or motion. For a blank copy of this form, see Chapter 10, Appendix A. The “In Forma Pauperis Affidavit” includes two parts: (1) an affidavit stating that you are unable to pay court costs and supporting documents and (2) an affidavit from a third person, other than your lawyer, who knows you and your financial situation and believes you are unable to pay court costs.

If you bring a claim in state court without exhausting (using up) your administrative remedies, it will be dismissed without prejudice (meaning you can bring it again after you have exhausted).<sup>174</sup> Also, you cannot bring a claim *in forma pauperis* if on three or more prior occasions you have brought an action or appeal in a state court that was dismissed because it was frivolous, malicious, failed to state a cause of action, or failed to state a claim upon which relief can be granted.<sup>175</sup> Further, a prisoner cannot bring a claim under state law for mental or emotional injury without a showing a physical injury.<sup>176</sup> Further, the Louisiana Prison Litigation Reform Act does not allow prisoners to bring together their claims so that there

<sup>163</sup> Smith v. Lafayette Parish Sheriff’s Office, 03-517, p. 7 (La. App. 4 Cir. 4/21/03); 874 So. 2d 863, 867–868.

<sup>164</sup> Gregor v. Argenot Great Cent. Ins. Co., 2002-1138, p. 12 (La. 7/14/03); 851 So. 2d 959, 967 (overruling Fowler v. Roberts, 556 So. 2d 1, 15 (La. 1989)). See also Smith v. Lafayette Parish Sheriff’s Office, 2003-517, pp. 6–7, (La. App. 4 Cir. 4/21/03); 874 So. 2d 863, 867–868 (holding that Sheriff’s hiring policy was policymaking or discretionary act, for which the Sheriff could not be held liable).

<sup>165</sup> Moore v. Taylor, 541 So. 2d 378, 381 (La. App. 2 Cir. 1989) (citing Cleveland v. State, 380 So. 2d 105 (La. App. 1 Cir. 1979)) (noting that Louisiana judicial immunity mirrors the federal doctrine).

<sup>166</sup> Amato v. Office of La. Comm’r of Sec., 94-0082, p. 9 (La. App. 4 Cir. 10/3/94); 644 So. 2d 412, 418 (citing Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988)).

<sup>167</sup> Dourousseau v. La. State Racing Comm’n, 98-0442, p.4 (La. App. 4 Cir. 12/9/98); 724 So. 2d 844, 846 (noting “it has become common to recognize quasi-judicial immunity, equivalent to judicial immunity”).

<sup>168</sup> LA. REV. STAT. ANN. §§ 15:1181–15:1191 (2017).

<sup>169</sup> LA. REV. STAT. ANN. § 15:1184(A)(2) (2017) (“No prisoner suit shall assert a claim under state law until such administrative remedies as are available are exhausted.”).

<sup>170</sup> LA. REV. STAT. ANN. § 15:1187 (2017).

<sup>171</sup> LA. REV. STAT. ANN. § 15:1182 (2017).

<sup>172</sup> LA. CODE CIV. PROC. ANN. arts. 5181–5188 (2017).

<sup>173</sup> LA. CODE CIV. PROC. ANN. art. 5181(A) (2017).

<sup>174</sup> LA. REV. STAT. ANN. § 15:1184(A)(2) (2017). Administrative remedies are defined as “written policies adopted by governmental entities responsible for the operation of prisons which establish an internal procedure for receiving, addressing, and resolving claims by prisoners with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison.” LA. REV. STAT. ANN. § 15:1184(A)(1)(a) (2017).

<sup>175</sup> LA. REV. STAT. ANN. § 15:1187 (2017).

<sup>176</sup> LA. REV. STAT. ANN. § 15:1184(E) (2017).



are multiple plaintiffs.<sup>177</sup> Additionally, if prisoners file a suit *pro se* (without a lawyer) they cannot file a class action.<sup>178</sup>

It is important to understand that many of the restrictions the federal PLRA puts on prisoners bringing civil liberties claims also will exist if you try to bring a claim in state court. One difference between the Louisiana Prison Litigation Reform Act and the PLRA is that in Louisiana state court, your case will be dismissed after three years if you do not pay the filing fees for an *in forma pauperis* suit.<sup>179</sup> Under the PLRA, your motion will not be dismissed simply because you are unable to pay the filing fees.<sup>180</sup>

### c. Louisiana's Administrative Remedy Procedure (ARP)

Under Louisiana state law, prisoners filing claims in state court must exhaust (use up) all available remedies—such as grievance procedures and appeals—*before* you go to court.<sup>181</sup> In Louisiana, you are required to use the two-step Administrative Remedy Procedure to fully exhaust all available remedies before filing in state or federal court.<sup>182</sup> First, you must write a letter to your prison's warden that briefly explains your claim and what relief you seek.<sup>183</sup> You should write the grievance letter within 90 days of the incident that is the subject of your claim.<sup>184</sup> The warden then has 40 days to respond to your claim.<sup>185</sup> If you are unsatisfied with your response, then you can move to the second step and appeal to the Secretary of the DPSC within 5 days of receiving a response.<sup>186</sup> You will be notified within 45 days of the Secretary's final decision.<sup>187</sup>

You might believe that your complaint is sensitive in nature and you would be negatively impacted if your complaint became known at your prison. If so, you can skip the first step and file your complaint directly with Louisiana's Secretary of Adult Services through the Chief of Operations of the Office of Adult Services.<sup>188</sup> If the Chief of Operations determines that it is not sensitive, however, you will receive written notice, and you will have 5 days to file the complaint the normal way, from the first step.<sup>189</sup>

If you are unsatisfied with the response to your appeal, then you can file a case in court.<sup>190</sup> In addition to setting requirements for Louisiana state court actions, the ARP also counts as an "available administrative remedy" under the federal PLRA. Therefore, you must go through the ARP to have exhausted all available remedies under the PLRA and Louisiana law. For more information on the Louisiana ARP, see Chapter 9 of the *Louisiana State Supplement*, "Inmate Grievance Procedures."

## 2. Substantive Claims

The section above describes some of the procedural hurdles that may affect your ability to bring a lawsuit for civil rights violations under state law. This section gives a brief overview of what claims you can bring in state court. You can bring a Section 1983 claim in state court as well as federal court. For the most part, the Louisiana courts follow the Fifth Circuit's and the Supreme Court's interpretation of Section 1983

<sup>177</sup> LA. REV. STAT. ANN. § 15:1184(G) (2017).

<sup>178</sup> LA. REV. STAT. ANN. § 15:1184(G) (2017).

<sup>179</sup> *Clifford v. Louisiana*, 347 F. App'x. 21, 23 (5th Cir. 2009) ("If the prisoner does not pay the full court costs or fees within three years from when they are incurred, the suit shall be abandoned and dismissed without prejudice.") (quoting LA. REV. STAT. ANN. § 15:1186 (2009)).

<sup>180</sup> 28 U.S.C. § 1915(b)(4) (2017) ("In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.").

<sup>181</sup> LA. REV. STAT. ANN. § 15:1184(A)(2) (2017).

<sup>182</sup> LA. ADMIN. CODE tit. 22, § 325 (2017).

<sup>183</sup> LA. ADMIN. CODE tit. 22, § 325(G)(1)(a) (2017).

<sup>184</sup> LA. ADMIN. CODE tit. 22, § 325(G)(1) (2017).

<sup>185</sup> LA. ADMIN. CODE tit. 22, § 325(J)(1)(a)(2) (2017).

<sup>186</sup> LA. ADMIN. CODE tit. 22, § 325(J)(1)(b)(i) (2017).

<sup>187</sup> LA. ADMIN. CODE tit. 22, § 325(J)(1)(b)(ii) (2017).

<sup>188</sup> LA. ADMIN. CODE tit. 22, § 325(H)(1)(b) (2017).

<sup>189</sup> LA. ADMIN. CODE tit. 22, § 325(H)(1)(b)(i) (2017).

<sup>190</sup> LA. ADMIN. CODE tit. 22, § 325(J)(1)(b)(iv) (2017).

claims. Thus, this section will focus on non-Section 1983 claims you can bring in state court if your civil rights are violated.

Many state law claims involve violations of the Louisiana constitution. For prisoners, Louisiana courts have emphasized that constitutional rights are not unqualified, especially when prison security is concerned.<sup>191</sup> Nonetheless, the Louisiana constitution provides protections for several important rights for prisoners:

- 1) Right to Due Process<sup>192</sup>
- 2) Right to Individual Dignity (equal protection)<sup>193</sup>
- 3) Right to Privacy (including unreasonable searches and seizures)<sup>194</sup>
- 4) Freedom of Expression<sup>195</sup>
- 5) Freedom of Religion<sup>196</sup>
- 6) Right of Assembly<sup>197</sup>
- 7) Freedom from Discrimination<sup>198</sup>
- 8) Right to Humane Treatment (protects against cruel, excessive, or unusual punishment)<sup>199</sup>
- 9) Access to Courts<sup>200</sup>

Prisoners have also brought constitutional challenges to the rules governing suits, such as immunity for sheriffs and parish governments for negligence claims and the rule dismissing *in forma pauperis* claims if fees are not filed within three years.<sup>201</sup> To challenge the constitutionality of a statute, Louisiana courts have held that: 1) you must plead unconstitutionality in the trial court, 2) you must make a specific plea, and 3) you must state particular grounds outlining the basis of unconstitutionality.<sup>202</sup> Outside of constitutional claims, prisoners have brought several tort claims such as personal injury suits against the DPSC,<sup>203</sup> medical malpractice suits,<sup>204</sup> and negligence suits for inadequate facilities and insufficient personnel to protect prisoners in custody.<sup>205</sup> Note that you do not need to exhaust administrative remedies through the ARP for tort claims.<sup>206</sup> For more information on tort claims, see Chapter 10 of the *Louisiana State Supplement*, “Tort Actions.” Remember, under state law, prisoners cannot bring claims for mental or emotional injury they suffered while in custody without showing physical injury.<sup>207</sup>

#### D. CONCLUSION

This Chapter has discussed how Section 1983 claims are treated under the Fifth Circuit and how state civil liberties claims can be brought in Louisiana state court. If your constitutional rights have been

<sup>191</sup> *Rochon v. Maggio*, 517 So. 2d 213, 216 (La. App. 1 Cir. 1987) (citing *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977)).

<sup>192</sup> LA. CONST. art. I, § 2.

<sup>193</sup> LA. CONST. art. I, § 3. Generally, prisoners bring equal protection claims under Article 1, Section 3 of the constitution because it prohibits discrimination on the basis of race, religion, birth, age, sex, culture, physical condition, and political ideas or affiliations.

<sup>194</sup> LA. CONST. art. I, § 5.

<sup>195</sup> LA. CONST. art. I, § 7.

<sup>196</sup> LA. CONST. art. I, § 8.

<sup>197</sup> LA. CONST. art. I, § 9.

<sup>198</sup> LA. CONST. art. I, § 12 (prohibiting discrimination “based on race, religion, or national ancestry and from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition”).

<sup>199</sup> LA. CONST. art. I, § 20.

<sup>200</sup> LA. CONST. art. I, § 22.

<sup>201</sup> *Rhone v. Ward*, 45,008, pp. 1–2 (La. App. 2 Cir. 2/3/10); 31 So. 3d 591, 594.

<sup>202</sup> *Cesar v. Hebert*, 2005-1195, p. 2 (La. App. 3 Cir. 4/5/06); 926 So. 2d 139, 141–142 (involving a claim of injuries sustained while in custody of DPSC).

<sup>203</sup> See *Cheron v. LCS Corr. Servs., Inc.*, 2004-0703, pp. 1–2 (La. 1/19/05); 891 So. 2d 1250.

<sup>204</sup> See *Medford v. State ex. rel. Charity Hosp. at New Orleans*, 2002-0750, p. 1 (La. App. 1 Cir. 5/15/02); 825 So. 2d 1213.

<sup>205</sup> See *Betsch v. State*, 353 So. 2d 358, 359 (La. App. 1 Cir. 1977).

<sup>206</sup> LA. REV. STAT. ANN. § 15:1177(C) (2017) (“Delictual actions for injury or damages shall be filed separately as original civil actions.”).

<sup>207</sup> LA. REV. STAT. ANN. § 15:1184(E) (2017).

violated, you may be able to get monetary or injunctive relief by suing state and local officials. Unfortunately, the Prison Litigation Reform Act and the Louisiana Prison Litigation Reform Act impose harsh restrictions on your ability to file lawsuits in federal and state court. That is why it is extremely important to read this Chapter in addition to Chapters 14 and 16 of the main *JLM* to make sure that your claim will be heard in court.

## CHAPTER 9: INMATE GRIEVANCE PROCEDURE IN LOUISIANA\*

### A. INTRODUCTION

If you have a problem with your treatment in correctional facilities in the State of Louisiana, you must take a look at the formal prisoner grievance procedures (or formal actions) in your correctional facility. Federal law<sup>1</sup> and Louisiana state law<sup>2</sup> require you to exhaust (or use up) all of the grievance procedures available to you before you take a complaint to court. You should also carefully read Chapter 14 of the main *JLM*, “The Prison Litigation Reform Act,” before filing any type of lawsuit. The federal government requires that you go through all of the administrative remedies in your prison before you can bring a federal suit in court.<sup>3</sup> States and counties may create grievance procedures for prisoners to use before filing suit, but these procedures must meet the minimum standards of federal requirements before they are licensed by the U.S. government.<sup>4</sup>

In Louisiana, the Corrections Administrative Remedy Procedure law (“CARP”) requires the Louisiana Department of Public Safety and Corrections (“DPSC”) to create the Administrative Remedy Procedures (“ARP”) to address the grievances in each correctional facility in the state.<sup>5</sup> This section of the CARP law also states that, “[s]uch administrative procedures, when promulgated, *shall provide the exclusive remedy available* to the offender for complaints or grievances governed [by it, so far] as federal law allows.”<sup>6</sup> This means that these procedures are the only way (initially) to address any complaint you might have about your treatment in a correctional facility. The ARP is a two-step system for reviewing inmate complaints.<sup>7</sup> It seeks to provide “procedures for receiving, hearing, and disposing of any and all complaints and grievances by [offenders] . . . which arise while an offender is within the custody or under the supervision of the department, a contractor operating a private prison facility, or a sheriff.”<sup>8</sup> The laws creating the ARP are in the Louisiana Revised Statutes.<sup>9</sup> And the actual ARP guidelines are found in Title 22 of the Administrative Code of Louisiana.<sup>10</sup>

This Chapter seeks to help you make an informed decision about addressing your grievance through the Louisiana ARP. Part B of this chapter discusses the PLRA requirement that you must go through the whole administrative complaint process in your prison before taking your claim to state or federal court, as explained in Chapter 15 of the main *JLM*. Part C describes the different ways that state courts can review your final ARP decision if you choose to challenge that decision in court. Part D defines the term “grievance,” lists the grievances that cannot be addressed through the ARP, describes important prison ARP requirements, and explains how to write a grievance in a Louisiana prison. Part E outlines the basic structure of the Louisiana ARP. Part F goes into more detail about the Administrative Code, explaining

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\* This Chapter was written by Eduardo Gardea.

<sup>1</sup> 42 U.S.C. § 1997e(a) (2012) (“No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”). This section applies to any federal civil actions brought by inmates in court for any violation of their rights or unjust treatment while in prison.

<sup>2</sup> LA. REV. STAT. ANN. § 15:1184(A)(2) (2017) (“No prisoner suit shall assert a claim under state law until such administrative remedies as are available are exhausted. If a prisoner suit is filed in contravention of this Paragraph, the court shall dismiss the suit without prejudice.”). This section applies to claims brought by prisoners in Louisiana state courts (unlike federal civil actions in footnote 1 above).

<sup>3</sup> 42 U.S.C. § 1997e(a) (2012).

<sup>4</sup> 28 C.F.R. §§ 40.1–40.10 (2018). These sections of the Code of Federal Regulations outline the different requirements and standards that all grievance procedures have to meet before being federally certified by the Department of Justice of the United States.

<sup>5</sup> LA. REV. STAT. ANN. § 15:1171(A) (2017) (“The Department of Public Safety and Corrections and each sheriff may adopt an administrative remedy procedure at each of their adult and juvenile institutions, including private prison facilities.”).

<sup>6</sup> LA. REV. STAT. ANN. § 15:1171(B) (2017).

<sup>7</sup> One step is meant to investigate the complaint and the second is for appealing the decision from the first step. LA. ADMIN. CODE tit. 22 §§ 325(J)(1)(a)–(b) (2017).

<sup>8</sup> LA. STAT. ANN. § 15:1171(B) (2017).

<sup>9</sup> LA. STAT. ANN. §§ 15:1171–15:1179 (2017).

<sup>10</sup> See LA. ADMIN. CODE tit. 22 § 325 (2017).

specific steps to follow when filing a grievance through the ARP. Part G briefly outlines the separate administrative procedure for any lost property claims that you may have. Finally, Part H describes judicial review of ARP grievances.

## B. EXHAUSTING YOUR ADMINISTRATIVE REMEDIES

As explained in Part A, the PLRA requires you to go through your facility's entire grievance process before you can bring a federal claim under 42 U.S.C. § 1983 (a federal law that deals with civil rights complaints).<sup>11</sup> The PLRA is a federal law that says when prisoners can bring federal claims in court. Although the PLRA deals with a federal complaint, it is important to note that a federal complaint can be brought in both federal and state courts.<sup>12</sup> Hence, the federal requirement that you "exhaust" your administrative remedies applies to claims brought in both state and federal district courts.

As stated in Chapter 15 of the main *JLM*, even if you believe that the grievance system in your prison is unfair or pointless, it is important that you still go through all of the steps of the process to try to resolve your grievance *before* you file a lawsuit in state or federal court.<sup>13</sup> In Louisiana, the ARP is not considered exhausted until you have received a final decision of your Step-2 appeal from the office of the Secretary of the Department of Public Safety and Corrections.<sup>14</sup> If you bring a federal complaint in court under 42 U.S.C. § 1983 before first exhausting your administrative remedies, your case will be dismissed, and you may be prevented from bringing that case in the future. A dismissal for non-exhaustion is supposed to be "without prejudice," which means that you will be able to come back to court after following the grievance procedures.<sup>15</sup> However, if the statute of limitations has run out on your claim before you return to court, your claim will be permanently barred (not allowed).<sup>16</sup> You should read Chapter 15 of the main *JLM* for more on the federal requirement regarding exhaustion of administrative remedies.

In addition to filing your claim under federal law, Louisiana also allows you to challenge decisions from the ARP in state courts under *state law*.<sup>17</sup> However, like in the federal system, state law also requires that you exhaust your administrative remedies before you can file a claim in court.<sup>18</sup> Therefore, if you intend

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<sup>11</sup> 42 U.S.C. § 1997e(a) (2012). Note that the PLRA exhaustion requirement applies only to cases filed on or after April 26, 1996, the effective date of the PLRA, and only for prisoners who sue while they are incarcerated. *See* *Porter v. Nussle*, 534 U.S. 516, 520, 122 S. Ct. 983, 986 (2002) (affirming that the PLRA exhaustion requirement "applies to all prisoners seeking redress for prison circumstances or occurrences"); *White v. McGinnis*, 131 F.3d 593, 595 (6th Cir. 1997) (finding prisoner's claims were properly dismissed when he had failed to exhaust his administrative remedies and stating that "exhaustion requirement applies only to cases filed on or after the April 26, 1996 effective date of the PLRA"). *See* Chapter 16 of the main *JLM* for more information on 42 U.S.C. § 1983 actions.

<sup>12</sup> Although federal courts can be used to try federal matters, our system of government has always allowed state courts to try state and federal cases as well. This is why you can file a federal claim in both state and federal court, even though you are doing so under a federal law.

<sup>13</sup> If you receive a satisfactory remedy from the ARP, then there will be no need to go to court. If you are unsatisfied with the result of the ARP, you may then file a lawsuit in federal court.

<sup>14</sup> LA. ADMIN. CODE tit. 22 § 325(F), (J) (2017). The Louisiana Administrative Remedy Procedure (ARP) is broken up into two steps. You will receive a signed decision from ARP personnel after you file your initial grievance, and you will have to appeal that decision if you feel it does not address your complaint. The ARP will not be considered exhausted until you receive an answer from this second step (the appeal of your initial grievance decision) and only then will you be able to file a suit in federal and state court.

<sup>15</sup> *See* *Dillon v. Rogers*, 596 F.3d 260, 272 (5th Cir. 2010) ("[E]xhaustion is a threshold issue that courts must address to determine whether litigation is being conducted in the right forum at the right time . . ."). On the other hand, a dismissal "with prejudice" means that you cannot bring that issue back to the court because it has been legally decided against you.

<sup>16</sup> *See* *Jones v. Bock*, 549 U.S. 199, 215, 127 S. Ct. 910, 920–921 (2007) (holding that courts can dismiss for failure to state a claim when the existence of an affirmative defense, like a *statute of limitations bar*, is apparent from the face of the complaint).

<sup>17</sup> LA. CONST. art. V, § 16(A) ("[A] district court shall have original jurisdiction of all civil and criminal matters."); LA. STAT. ANN. § 15:1177(A) (2017) ("Any offender who is aggrieved by an adverse decision . . . pursuant to any administrative remedy procedures under this Part, may . . . seek judicial review . . .").

<sup>18</sup> LA. STAT. ANN. § 15:1184(A)(b)(2) (2017) ("No prisoner suit shall assert a claim under state law until such administrative remedies as are available are exhausted. If a prisoner suit is filed in [violation] of this Paragraph, the court shall dismiss the suit without prejudice.").

to bring a claim in court challenging the decision of the ARP (whether it is a federal or a state claim), you are still required to go through the entire ARP process before a court can hear your claim. If you disagree with the final decision of the ARP and wish to file suit in court, the court's treatment of your case depends on the type of issue you are bringing. Part C below goes further into what courts are allowed to do if you succeed in challenging an ARP decision in state court.

### C. GRIEVANCES IN THE STATE OF LOUISIANA

Before outlining the steps and rules of the Louisiana Administrative Remedy Procedures, it is important to know what types of issues can and cannot be filed through the grievance system. Hence, this Part will deal with (1) issues that can be brought through the ARP, (2) issues that cannot be brought through the ARP, (3) the "screening out" process that all grievances must go through, (4) grievances that get special treatment under the ARP, and (5) the remedies you may receive. This will give you a good idea of the types of incidents for which you can file a grievance. It will also cover the requirements for filing a grievance under the ARP.

#### 1. What Grievances Can Be Raised?

The Administrative Remedy Procedure defines a "grievance" as a "written complaint by a [prisoner] on the [prisoner]'s own behalf regarding a policy applicable within an institution, a condition within an institution, an action involving a [prisoner] of an institution or an incident occurring within an institution."<sup>19</sup> Simply put, a grievance is a prisoner's written complaint about the conditions, rules, regulations, or policies that either harmed him or placed him in danger while in the custody of his correctional facility. This means that you can't file a grievance for something unless you were personally affected, and you must file your own grievance.<sup>20</sup> The state legislature, state case law, and the policies of the Department of Public Safety and Corrections decide what "issues" are "grievable" for the purposes of addressing them through the ARP.<sup>21</sup>

Broadly, the ARP defines grievable issues as complaints and grievances that include, but are not limited to, any claim seeking monetary, injunctive, declaratory, or any other form of relief authorized by law.<sup>22</sup> Given that broad definition, the CARP law lists some examples of grievable issues. The ARP guidelines say that, "by way of illustration," grievable issues may include the following actions having to do with:<sup>23</sup>

- 1) Conditions of Confinement;<sup>24</sup>
- 2) Personal Injuries;<sup>25</sup>
- 3) Medical Malpractice;<sup>26</sup>

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<sup>19</sup> See LA. ADMIN. CODE tit. 22 § 325(E) (2017).

<sup>20</sup> See LA. ADMIN. CODE tit. 22 §§ 325(D), (E) (2017).

<sup>21</sup> LA. STAT. ANN. § 15:1171(B) (2017) ("Such complaints and grievances include but are not limited to any and all claims seeking monetary, injunctive, declaratory, or any other form of relief authorized by law . . .").

<sup>22</sup> See LA. ADMIN. CODE tit. 22 § 325(D) (2017).

<sup>23</sup> See LA. ADMIN. CODE tit. 22 § 325(D) (2017).

<sup>24</sup> See *Lay v. Rachel-Major*, 99-0476, pp. 5–6 (La. App. 1 Cir. 5/12/00); 761 So. 2d 723, 726–727 (asserting that a prisoner had a fair opportunity to challenge his punishment of extended lockdown through the ARP); see also *Ngo v. Estes*, 04-186, p. 4–5 (La. App. 3 Cir. 9/29/04); 882 So. 2d 1262, 1265 (stating that, "A claim seeking a remedy with respect to a prisoner's conditions of confinement is subject 'not only to administrative review, but also to the provisions concerning judicial review of administrative acts.'").

<sup>25</sup> See *Edmond v. Dep't. of Public Safety*, 31,821, pp. 5–6 (La. App. 2 Cir. 3/31/99); 732 So. 2d 645, 648–649 (affirming the use of the ARP system as the exclusive administrative relief for a prisoner's claim of personal injury against his correctional facility and stating the administrative remedies must be exhausted before filing suit).

<sup>26</sup> See *Walker v. Appurao*, 2009-0821, p. 4 (La. App. 1 Cir. 10/23/09); 29 So. 3d 575, 577 (holding that prisoner was required to exhaust his administrative remedies prior to filing medical malpractice lawsuit in the state district court); see also *Jeanlouis v. Stalder*, 2009-1653, p. 6 (La. App. 1 Cir. 3/26/10); 36 So. 3d 938, 942 (deciding on the properly ARP-challenged issue regarding the prisoner's medical treatment claim).

- 4) Time Computations;<sup>27</sup>
- 5) Claims under a Writ of Habeas Corpus;<sup>28</sup> and
- 6) Challenges to Rules, Regulations, Policies, or Statutes.<sup>29</sup>

It is important to remember, however, that these are not all of the possible grievable issues. This list of potential grievances includes only some of the many other potential grievances that you can file. But since these grievances are explicitly mentioned in the ARP guidelines as potentially grievable, it may be a good idea to phrase your claim like one of these if your claim fits into one of these categories. But remember that this is not a complete list of *all* grievable issues. You should not stop yourself from filing a grievance if it does not fall into one of those categories. If you feel that you have been treated unjustly, injured, or put in danger, you should file a grievance through the ARP. Filing a complete and accurate grievance is the best way to find out if your complaint is a grievance or not.

## 2. Non-Grievable Issues<sup>30</sup>

Non-grievable issues are those issues for which the grievance system has no remedy and cannot be appealed through the ARP.<sup>31</sup> Both federal law and state law require you to exhaust your administrative remedies through the ARP if any remedy is “available” to you.<sup>32</sup> This means that you have to go through the ARP even if it cannot give you the exact solution or relief that you want. For example, if you have a complaint about the way a prison policy was applied to you, it is likely that this complaint can be addressed through an ARP grievance. But if you are prevented from using the ARP, then you are not required to exhaust your administrative remedies.<sup>33</sup> However, this exception is rare and it is probably a good idea to file a grievance for any harm that you may later want to challenge in court. In addition, the Louisiana ARP requires you to attempt to resolve your grievance issue informally. If you fail to demonstrate an attempt to solve the issue informally, you may be taken out of the process, and your claim will likely be dismissed.<sup>34</sup> Hence, you should make some attempt at resolving the issue informally before filing an ARP grievance.

Just as the ARP clearly states several examples of issues that can be filed as grievances, there are also non-grievable issues that the ARP plainly says it will not address. The ARP explicitly states that the following matters *cannot* be processed through the administrative remedy procedure:<sup>35</sup>

- 1) Court decisions and pending criminal matters over which the department has no control or jurisdiction;

<sup>27</sup> See *Walker v. Louisiana Department of Corrections*, 2010-0057, pp. 5–6 (La. App. 1 Cir. 6/11/10); 40 So. 3d 1238, 1241–1242 (holding that the prisoner had to exhaust the Administrative Remedy Procedure (ARP) in challenging forfeiture of good time credits).

<sup>28</sup> See *McCoy v. Stalder*, 99-1747, pp. 10–11 (La. App. 1 Cir. 9/22/00); 770 So. 2d 447, 453 (asserting that the CARP applies to § 1983 actions by prisoners); see also *Vessel v. LeBlanc*, 2009-1869, pp. 3–4 (La. App. 1 Cir. 6/11/10); No. 2009-CA-1869, 2010 LEXIS 360, at \*2–3 (vacating a decision from a private prison made regarding a prisoner’s administrative remedy request for habeas corpus claim).

<sup>29</sup> See *Vincent v. Stalder*, 2004-1750, pp. 5–6 (La. App. 1 Cir. 9/23/05); 923 So. 2d 108, 110–111 (asserting that a prisoner’s claim challenging DOC practices concerning the ARP was properly decided by the petitioner’s ARP grievance regarding the same claim).

<sup>30</sup> See LA. ADMIN. CODE tit. 22 § 325(F)(3)(a)(iv) (2017).

<sup>31</sup> See LA. ADMIN. CODE tit. 22 § 325(F)(3)(a)(iv) (2017).

<sup>32</sup> See *Booth v. Churner*, 532 U.S. 731, 733–734, 121 S. Ct. 1819, 1821 (2001) (recognizing that the PLRA requires prisoners to exhaust administrative remedies that are *available* before suing over prison conditions) (emphasis added); LA. REV. STAT. § 15:1184(A)(2) (2015) (“No prisoner suit shall assert a claim under state law until . . . administrative remedies as are available are exhausted.”); See also *Cheron v. LCS Corr. Serv.*, 2002-1049, p. 6 (La. App. 1 Cir. 2/23/04); 872 So. 2d 1094, 1098 (affirming that state law prohibits prisoners from filing court claims until they exhaust the administrative remedies *available* to them).

<sup>33</sup> See *Edwards v. Bunch*, 2007-1421, pp. 8–9 (La. App. 1 Cir. 03/26/08); 985 So. 2d 149, 154–155, *adhered to on reh’g*, 985 So. 2d 149 (La. App. 1 Cir. 06/18/08) (holding that the prisoner’s particular claim could be heard in court without going through the grievance because he was prevented from using the grievance system).

<sup>34</sup> See LA. ADMIN. CODE tit. 22 § 325(G)(1) (2017); see also *Coleman v. Thompson*, 05-0857, pp. 9–10 (La. App. 3 Cir. 03/01/06); 923 So. 2d 889, 895 (affirming the ARP’s requirement of an attempt at informal resolution before filing a formal grievance).

<sup>35</sup> See LA. ADMIN. CODE tit. 22 § 325(F)(3)(a)(iv) (2017).

- 2) Pardon board and parole board decisions;<sup>36</sup>
- 3) Louisiana Risk Review Panel recommendations; and
- 4) Lockdown Review Board decisions.<sup>37</sup>

The Louisiana Department of Public Safety and Corrections has outlined these issues as those that cannot be decided through the ARP. The ARP is prohibited from deciding on those issues either because other administrative bodies are supposed to handle those issues, or because they are prevented from deciding these issues by law. Even if your grievance is written correctly, if it states a complaint that falls into one of the categories listed above, it will be dismissed. But as the next section shows, it is important to remember that your grievance can also be dismissed if it is filed incorrectly.

### 3. The Screening Out Process<sup>38</sup>

Before your grievance is investigated by a complaint reviewer, the ARP requires a Screening Officer to “screen” your complaint to make sure that it was filed correctly, in a timely and complete manner. All grievances must go through this mandatory screening process in which the Screening Officer goes through a checklist to make sure that your complaint was submitted correctly.<sup>39</sup> Your grievance can only proceed to the investigation step if the Screening Officer decides that you filed it correctly. If the filing is incorrect, it will be “screened out” of the Inmate Grievance System.<sup>40</sup> Complaints can be screened out for the following reasons:

- 1) The matter is not appealable through the ARP, such as:
  - a. Court decisions;
  - b. Parole Board/Pardon Board decisions;<sup>41</sup>
  - c. Louisiana Risk Review Panel recommendations; or
  - d. Lockdown Review Board decisions<sup>42</sup> (except as described in Section 2 above).
- 2) There is a specialized administrative remedy procedure in place for that specific type of complaint, such as:
  - a. Disciplinary matters; or
  - b. Lost property claims.
- 3) It is a duplicate request;<sup>43</sup>
- 4) In cases where a number of prisoners have filed similar or identical requests seeking administrative remedies, it is appropriate to respond only to the prisoner who filed the initial request;<sup>44</sup>
- 5) The complaint concerns an action not yet taken or a decision that has not yet been made;<sup>45</sup>

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<sup>36</sup> See *Black v. La. Parole Bd. Mbrs*, 2009-2163, p. 3 (La. App. 1 Cir. 05/07/10); 2010 LEXIS 244, at \*2 (affirming the dismissal by the ARP of a claim seeking to contest a Parole Board decision). Under Louisiana law, decisions of these boards are discretionary, and may not be challenged.

<sup>37</sup> However, you can submit a grievance related to a Lockdown Review Board decision if it fails to follow its procedure, if (a) no reasons are given for the decision of the board, or (b) a hearing is not held within the 90 days from the offender’s original placement in lockdown or from the last hearing.

<sup>38</sup> See LA. ADMIN. CODE tit. 22 § 325(I) (2017).

<sup>39</sup> See LA. ADMIN. CODE tit. 22 § 325(I) (2017).

<sup>40</sup> See *Walker v. Appurao*, 2009-0821, p. 3 (La. App. 1 Cir. 10/23/09), 29 So. 3d 575, 577 n.2 (reiterating the 90-day period to file for an administrative remedy after a delictual claim).

<sup>41</sup> See *Black v. La. Parole Bd. Members*, 2009-2163 (La. App. 1 Cir. 5/7/10); 2010 La. App. LEXIS 244, at \*2 (unpublished) (affirming the dismissal by the ARP of a claim seeking to contest a Parole Board decision).

<sup>42</sup> See *Ferguson v. Cain*, 2009-2017 (La. App. 1 Cir. 5/7/10); 2010 La. App. LEXIS 246, at \*3 (unpublished) (affirming the Commissioner’s dismissal of a prisoner’s claim because the “DPSC should have rejected the initial complaint for raising an issue that could not be appealed through the [ARP]”).

<sup>43</sup> See *Thomas v. Hebert*, 2010-1317 (La. App. 1 Cir. 2/11/11); 2011 La. App. LEXIS 88, at \*5 (unpublished) (affirming as the explicit right of a Screening Officer to reject a duplicate grievance from the ARP).

<sup>44</sup> In these cases, copies of the “decision sent to other offenders who filed requests simultaneously regarding the same issue will constitute a completed action.” All of those requests will be logged. See LA. ADMIN. CODE tit. 22 § 325(F)(3)(a)(x) (2017).

<sup>45</sup> See *Galbraith v. LeBlanc*, 2009-1841 (La. App. 1 Cir. 5/7/10); 2010 La. App. LEXIS 277, at \*6 (unpublished) (affirming the dismissal of a prisoner’s claim because it was premature).



- 6) You requested a remedy for another prisoner;<sup>46</sup>
- 7) You requested a remedy for more than one incident (a multiple complaint);<sup>47</sup>
- 8) You did not follow the established rules of the ARP;
- 9) If you refuse to cooperate with the inquiry into the allegation, the request may be denied due to lack of cooperation;<sup>48</sup>
- 10) More than 30 days have passed between the event and the initial request, *unless waived by the Warden*.<sup>49</sup>

Whether your grievance is “screened out” or moved on to the investigation step, you should receive notice of the initial acceptance or rejection of your complaint after it has been reviewed by a Screening Officer.<sup>50</sup>

As you can see from this list, there are several reasons that a Screening Officer can give to dismiss your claim before it is even investigated. So, it is important that you write your grievance clearly, to submit it in a timely manner, and to make sure that your grievance does not fall into any of the categories listed above. Taking special care to write your grievance well and filing it correctly can ensure that your grievance will not be dismissed and returned to you before being investigated.

#### 4. Emergency and Sensitive Grievances

The two-step grievance process in the ARP was meant to address and decide most grievance complaints. Still, the DPSC recognizes that there are incidents and problems that would continue to cause more problems for prisoners if they waited for the two-step ARP process to resolve them. There are also grievances that are particularly sensitive and require additional safeguards. For these reasons, the ARP provides two exceptions to the two-step process: “Emergency” and “Sensitive” grievances.<sup>51</sup>

##### a. Emergency Grievances

The ARP defines “emergency grievances” as matters for which resolution “within the regular time limits would subject the [prisoner] to a substantial risk of personal injury or cause other serious and irreparable harm to the [prisoner].”<sup>52</sup> As compared to a regular grievance addressing a harm that was done to you and is now over, emergency grievances tend to be problems that are not yet “over.” They tend to be current threats or injuries that have the potential of becoming worse if they are not addressed more quickly than regular grievances. For example, if you are receiving serious threats from another prisoner, an emergency grievance can address the threat more quickly and therefore reduce your likelihood of injury because the threatening prisoner will have less time to follow through on his threats.

If you feel that your grievance is an emergency, you should send a request directly to your shift supervisor. Your shift supervisor should then “immediately review” the grievance and forward it to the level at which the “corrective action [can] be taken.”<sup>53</sup> You should not hesitate to use this emergency procedure if you genuinely feel that your problem is an emergency that will cause other serious and irreparable harm. But note that you can be disciplined (your complaint will be dismissed as “frivolous or malicious”) if you abuse the emergency procedure by using it for a complaint that is not really an emergency.<sup>54</sup>

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<sup>46</sup> See *Jacobson v. State*, 2010-0986 (La. App. 1 Cir 12/22/10); 2010 La. App. LEXIS 773, at \*10 (unpublished) (noting that a prisoner may not seek remedies for other prisoners).

<sup>47</sup> See *Robinson v. Cain*, 2005-2299, pp. 1–2 (La. App. 1 Cir. 11/3/06), 941 So. 2d 196 (affirming the department’s dismissal of the prisoner’s ARP claim because it brought multiple complaints).

<sup>48</sup> See LA. ADMIN. CODE tit. 22, § 325(J)(1)(a)(i) (2017).

<sup>49</sup> See LA. ADMIN. CODE tit. 22, § 325(I)(1)(a)(ii)(i) (2017).

<sup>50</sup> See LA. ADMIN. CODE tit. 22, § 325(I)(1)(a) (2017).

<sup>51</sup> See LA. ADMIN. CODE tit. 22, § 325(H) (2017).

<sup>52</sup> See LA. ADMIN. CODE tit. 22, § 325(E) (2017).

<sup>53</sup> Furthermore, all of the emergency grievance requests are logged-in on an “unusual occurrence” report. LA. ADMIN. CODE tit. 22, § 325(H)(1)(a) (2017).

<sup>54</sup> LA. ADMIN. CODE tit. 22, § 325(H)(1)(a)(i) (2017).

### b. Sensitive Grievances

The other special procedure, relating to “Sensitive Issues,” allows you to file a grievance more privately. If you believe that your complaint is sensitive and that you would be negatively affected if others in your facility knew about it, you can file a “sensitive complaint” directly with the Secretary of Adult Services at the DPSC (essentially skipping to the second step of the ARP).<sup>55</sup> To file a “sensitive complaint,” you must explain (in writing) your reason for filing privately, instead of filing in your institution.<sup>56</sup> If the Secretary of Adult Services agrees that your complaint is sensitive, he will accept and respond to the complaint.<sup>57</sup> If the Secretary does not agree that your complaint is “sensitive,” he will notify you in writing and return the complaint to your Warden’s office.<sup>58</sup> If this happens, you will have five days from the date the Warden’s office received the rejection to re-submit the complaint through the regular procedure.<sup>59</sup>

Note that, unlike an Emergency complaint, the ARP does not call for you to be disciplined if the reviewer disagrees with you about the sensitive status of your request. And, although you should in no way abuse this procedure by submitting a request that you do not truly believe is a sensitive issue, you should not hesitate to use this procedure if you feel that you will be harmed or injured for submitting a legitimate complaint.

## 5. Remedies and Prohibitions

The whole point of filing a grievance is to get a good result. Grievable issues are issues you write a complaint about. You can seek money, seek for certain actions to stop, or seek to resolve your legal issues. You can also seek any result allowed by law for unjust policies, actions, or practices affecting you while in prison.<sup>60</sup> CARP can fix grievances in several ways. First, you must have a valid, or justified, complaint. CARP allows the DPSC or your facility to change their policies and practices. DPSC may decide that you deserve money for your complaint.<sup>61</sup> If it determines you should receive money, the Office of Risk Management of the Division of Administration will review your case. This office decides how much you should receive.<sup>62</sup>

No prison can punish you for your good-faith use of the ARP system.<sup>63</sup> However, you may be disciplined if you do not use the system in good faith. You can be punished if you file a complaint that you know is wrong, that you want to be harmful, or that you know isn’t a real issue.<sup>64</sup> This is the same warning in other parts of the ARP. You should not be punished for using the ARP if you don’t abuse the system. If you are punished for using the ARP in good faith, you can file a complaint about that punishment.<sup>65</sup>

## D. HOW TO WRITE AN EFFECTIVE COMPLAINT

You can use several strategies to help you write and file a grievance. You have a better chance getting what you want if you use these strategies. Read this whole chapter to know when and how your

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<sup>55</sup> Essentially, this means that your grievance skips Step-1 and goes directly to the Step-2 so that there is less danger that word of your complaint will spread around the facility. LA. ADMIN. CODE tit. 22, § 325(H)(1)(b) (2017).

<sup>56</sup> See LA. ADMIN. CODE tit. 22, § 325(H)(1)(b) (2017).

<sup>57</sup> See LA. ADMIN. CODE tit. 22, § 325(H)(1)(b)(i) (2017).

<sup>58</sup> See LA. ADMIN. CODE tit. 22, § 325(H)(1)(b)(i) (2017).

<sup>59</sup> Hence, if your “sensitive-complaint” request is rejected, but if the ARP can decide your grievance, then you will have 5 days to re-submit the complaint through the first step of the ARP. LA. ADMIN. CODE tit. 22, § 325(H)(1)(b)(i) (2017).

<sup>60</sup> See LA. ADMIN. CODE tit. 22, § 325(D) (2017).

<sup>61</sup> See LA. ADMIN. CODE tit. 22, § 325(K)(1) (2017).

<sup>62</sup> LA. ADMIN. CODE tit. 22, § 325(K)(1)(b) (2017). The determination of the Office of Risk Management must still be returned to the DPSC for a final decision. See LA. ADMIN. CODE tit. 22, § 325(K)(1)(b) (2017). If a settlement is reached between the DPSC and the prisoner, a copy of the signed release of liability for the problem shall be given to the Warden on the same date. LA. ADMIN. CODE tit. 22, § 325(K)(1)(c) (2017).

<sup>63</sup> See LA. ADMIN. CODE tit. 22, § 325(F)(3)(a)(xiii) (2017). Punishments against prisoners for good-faith use of the ARP are called “reprisals,” and they are prohibited. See LA. ADMIN. CODE tit. 22, § 325(F)(3)(a)(xiii)(a) (2017).

<sup>64</sup> See LA. ADMIN. CODE tit. 22, § 325(F)(3)(a)(xiii)(b) (2017).

<sup>65</sup> See LA. ADMIN. CODE tit. 22, § 325(F)(3)(a)(xiii)(a) (2017).

grievance must be filed. Also, your prison or jail must orally explain the ARP system to you at orientation.<sup>66</sup> Your prison must give you the chance to ask questions and receive oral answers about the ARP. The ARP says that “all offenders may request information . . . or assistance in using the [ARP] from their classification officer or from a counsel substitute who services their living area.”<sup>67</sup> In addition, these rules must be posted in writing in areas readily accessible to all prisoners.<sup>68</sup>

All prisoners are entitled to use this procedure. It's the Warden's job to provide you any help with reading, writing, or language barriers.<sup>69</sup> You cannot get another prisoner to file a grievance for you. But you can get help and information from prison/jail officials about the system. You should really do this if you have any disability, or if English is not your first language. Use this help and the following strategies to write an effective grievance.

### 1. Writing the Complaint

First, you must write out your grievance in full and truthful detail. Do not make your complaint too long. Be brief or short in your explanation of what happened. List what result you want from the grievance. Describe the “who, what, when, where, and how” information about what happened.<sup>70</sup> List how you tried to solve the problem before you filed the grievance. If you do not first try to solve the problem on your own, your grievance may be denied by the Screening Officer.<sup>71</sup>

Second, you must show how you were personally affected by the incident you describe in your grievance. You can also show how you will be affected unless you get the result you want. You should clearly state the result you want.

Third, you must include the sentence, “This is a request for administrative remedy” or “ARP.”<sup>72</sup> The ARP cannot deny your request only because you didn't include this sentence. But a letter will only be accepted into ARP if it contains that sentence. Do not worry if you don't have an ARP-1 form. You can write your grievance in your own letter. You must say that sentence or phrase in your letter. You must also place the letter inside the manila envelope given to you by ARP administrators.<sup>73</sup>

Fourth, make sure that your complaint doesn't have insulting or threatening language. Using bad language hurts your chances of getting your desired result. However, you should try to be specific and accurate about the incident that caused your complaint. The more information the ARP reviewer has about your grievance, the more likely that it will be addressed completely.

Fifth, you should list in detail the result you want because the grievance investigator may think to consider some solutions only if you list them.

Finally, you must keep copies of all papers you get or submit. You may need to submit those papers if you file a claim in court. You must keep a copy of the initial complaint that you submit to the Warden. This complaint becomes part of the ARP process once it is submitted. This complaint will not be returned to you.<sup>74</sup> Courts may require a copy of these forms. Courts may also require copies of the written decisions that the Department of Corrections gave you after it made its final determination.<sup>75</sup>

## E. THE BASIC STRUCTURE OF THE LOUISIANA ARP

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<sup>66</sup> See LA. ADMIN. CODE tit. 22, § 325(F)(3)(a)(i) (2017).

<sup>67</sup> See LA. ADMIN. CODE tit. 22, § 325(F)(3)(a)(i)(c) (2017).

<sup>68</sup> See LA. ADMIN. CODE tit. 22, § 325(F)(3)(a)(i)(b) (2017).

<sup>69</sup> See LA. ADMIN. CODE tit. 22, § 325(F)(2) (2017).

<sup>70</sup> See LA. ADMIN. CODE tit. 22, § 325(G)(1)(a)(iii) (2017).

<sup>71</sup> See LA. ADMIN. CODE tit. 22, § 325(I) (2017).

<sup>72</sup> See LA. ADMIN. CODE tit. 22, § 325(G)(1)(a)(i)(a) (2017).

<sup>73</sup> See LA. ADMIN. CODE tit. 22, § 325(I)(1)(b) (2017).

<sup>74</sup> See LA. ADMIN. CODE tit. 22, § 325(G)(1)(a)(ii) (2017).

<sup>75</sup> See *Gray v. State*, 2005-617, p. 8 (La. App. 3 Cir. 2/15/06); 923 So. 2d 812, 818 n.1 (reiterating the ARP's command that prisoner's make and retain copied of their ARP documents to file court claims).

The Department of Public Services and Corrections may adopt an administrative remedy procedures at each adult institution. This includes private prisons.<sup>76</sup> DPSC's ARP system has a "2-Step" structure. Step 1 has complaints. Step 2 has appeals.<sup>77</sup>

### 1. Step 1 Complaints—The Facility Level

A prisoner must submit a written letter to the Warden to start Step 1. In this letter, you must state the basis for your grievance and what solution you want.<sup>78</sup> A Screening Officer checks the complaint. The complaint is then sent to the Warden's office for review.<sup>79</sup>

### 2. Step 2—The Appeal Level

If you do not like the result of your Step-1 decision, you may appeal at Step 2. You appeal to the Secretary of the DPSC. In Step 2, you must file an appeal in writing. You must state in writing that you are not satisfied with the Step-1 decision. Write this on your Step-1 form or letter.<sup>80</sup> Send the appeal request to the ARP screening officer. This officer mails it in to the DPSC. The Secretary makes a final decision.<sup>81</sup>

## F. THE RULES AND PROCEDURES OF THE LOUISIANA ARP

Follow the rules of the Administrative Remedy Procedure to get the most out of the grievance system. This Part outlines the ARP rules and procedures. This Part also outlines ARP's special provisions. These provisions can affect how and when decisions are made. Figure 1 at the end of this Part outlines the timeline for a complete ARP grievance.

### 1. General Procedures

The ARP procedures follow the two-step levels of authority. Step 1 is for complaints. Step 2 is for appeals. Before you write to the Warden in Step 1, you should try to resolve the problem without using ARP. If you want assistance, you should seek help from the Warden or other officials in your facility.<sup>82</sup> If you can't resolve your issue outside of ARP, then you can move to file a formal complaint.

### 2. The Step 1 Grievance

#### a. Filing the Complaint

In Step 1, file an ARP-1 Form if these are available. If not, you can write a letter that contains the sentence, "This is a request for administrative remedy" or "ARP."<sup>83</sup> This step is important. ARP does not require your first complaint to be written on an ARP-1 form. But ARP will not accept the form or letter unless it says "This is a request for administrative remedy" or "ARP."<sup>84</sup> You must write a clear and brief statement explaining your issue. You must also request a remedy, or solution. You must put the complaint in the manila envelope provided by grievance officers.<sup>85</sup> When you send that envelope to your Warden, your

<sup>76</sup> LA. STAT. ANN. § 15:1171(A) (2017).

<sup>77</sup> See LA. ADMIN. CODE tit. 22, §§ 325(J)(1)(a)–(b) (2017).

<sup>78</sup> See LA. ADMIN. CODE tit. 22, § 325(G)(1)(a)(i) (2017).

<sup>79</sup> See LA. ADMIN. CODE tit. 22, § 325(I)(a) (2017).

<sup>80</sup> See LA. ADMIN. CODE tit. 22, § 325(J)(1)(b) (2017).

<sup>81</sup> See LA. ADMIN. CODE tit. 22, § 325(J)(1)(b) (2017).

<sup>82</sup> See LA. ADMIN. CODE tit. 22, § 325(F)(3)(a)(ii) (2017) ("Nothing in this procedure should serve to prevent or discourage an inmate from communicating with the Warden or anyone else in the Department of Public Safety and Corrections.").

<sup>83</sup> See LA. ADMIN. CODE tit. 22, § 325(G)(1)(a)(i)(a) (2017).

<sup>84</sup> See LA. ADMIN. CODE tit. 22, § 325(G)(1)(a)(iv) (2017).

<sup>85</sup> See LA. ADMIN. CODE tit. 22, § 325(I)(1)(b) (2017).

complaint will be filed in the ARP. You have 90 days to file for an administrative remedy after an incident takes place.<sup>86</sup>

i. *Step-1 Screening*

The first part of Step 1 is the Screening Process. A Screening Officer will first review your complaint.<sup>87</sup> Screening Officers are appointed by the Warden. If your request is filed incorrectly for any reason already mentioned, the Screening Officer will return your complaint. You must fix or correct your complaint. Then you must refile your complaint. If the Screening Officer finds that your complaint was filed correctly, he will send the complaint to the office of the Warden for a review. You will receive a written notice telling you whether your complaint was screened out or processed for review.<sup>88</sup>

ii. *Step-1 Investigation and Decision*

The Screening Officer decides whether your complaint should be reviewed by the Warden. If the Officer decides your complaint should be reviewed, the complaint is sent to the Warden's Office. The Warden's staff will investigate, if necessary. Staff will then review your complaint. Once reviewed, the Warden must send you a written response of his decision within 40 days from the date you filed it, or 5 days if it is a PREA claim.<sup>89</sup>

a. *The Step-2 Appeal*

Step 1 is complete when the Warden sends you a written response to your complaint. If you are dissatisfied or unhappy with the Warden's determination, you can choose to move on to Step 2. Step 2 of the ARP reviews the Step-1 decision.<sup>90</sup> To start Step 2, you don't need to rewrite the original letter. The Warden's Step-1 response will have space for a brief statement requesting an appeal. You must write that you request a Step-2 appeal. You also must state the reason for your dissatisfaction with the Warden's Step-1 decision.<sup>91</sup>

Step 2 begins after you write your request and reason for appeal. First, you will send your request to the ARP screening officer within the 5 days after you receive your Step-1 response.<sup>92</sup> After he receives your request, the Secretary must send you a written response within 45 days. He must state his final decision for your complaint. You will get a copy of the decision. Your Warden will also get a copy.<sup>93</sup> When you receive this decision, your administrative remedies are exhausted. You may then file suit in court.<sup>94</sup>

b. *Responses and Withdrawals*

At each stage of decision and review, you will be provided written answers. These answers should explain the information gathered or the reason for the decision. These answers may also have simple directions for obtaining or receiving further review.<sup>95</sup> Any response that you get from the ARP staff, whether a decision or a dismissal, must clearly state the result of the investigation. It also must state the reasons for the decision.

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<sup>86</sup> See LA. ADMIN. CODE tit. 22, § 325(G)(1) (2017).

<sup>87</sup> See LA. ADMIN. CODE tit. 22, § 325(I)(1) (2017).

<sup>88</sup> See LA. ADMIN. CODE tit. 22, § 325(I)(1)(a) (2017).

<sup>89</sup> See LA. ADMIN. CODE tit. 22, § 325(J)(1)(a)(ii) (2017).

<sup>90</sup> See LA. ADMIN. CODE tit. 22, § 325(J)(1)(b)(i) (2017).

<sup>91</sup> See LA. ADMIN. CODE tit. 22, § 325(J)(1)(a)(iv) (2017).

<sup>92</sup> See LA. ADMIN. CODE tit. 22, § 325(J)(1)(b)(i) (2017).

<sup>93</sup> See LA. ADMIN. CODE tit. 22, §§ 325(J)(1)(b)(ii)–(iii) (2017).

<sup>94</sup> See LA. ADMIN. CODE tit. 22, § 325(J)(1)(b)(iv) (2017).

<sup>95</sup> See LA. ADMIN. CODE tit. 22, § 325(J) (2017).

You always have the option of ending the process. You may end the process if you feel you don't need the ARP to solve your problem. If you resolve your problem without the ARP, you may request (in writing) that the Warden cancel your formal request for an administrative remedy.<sup>96</sup>

c. Time Limits/Extensions

You will have a final determination within 90 days from the day you gave a staff member your Step-1 complaint.<sup>97</sup> But you can file a written request for a 5-day extension for any stage of the ARP. You should make these requests to the ARP Screening Officer if you want an extension to file a complaint. You should make the request to the Warden if you want an extension for the first step. You should make the request to the assistant Secretary of Adult Services for the second step.<sup>98</sup> You must demonstrate valid reasons for the delay and include them in your extension request in order for your extension request to be granted.<sup>99</sup>

d. Transferred and Released Inmates

If you filed a complaint in one facility and are transferred to another facility before the facility reviews your complaint (or if you file a complaint about your first facility after being transferred), your first facility will complete the process through Step 1. But the Warden in your second facility will help by communicating with you about that complaint.<sup>100</sup>

If you are released before the facility reviews your issue, and if that issue still affects you after you are released (or if you file such a request after being released), the facility that released you will process the request and notify you at your last known address. All other requests will be considered no longer applicable when you are discharged, and the process will then not be completed.<sup>101</sup>

e. ARP Records Policy

All ARP records are confidential. Only employees who help to administer the complaint will have access to these confidential records. Otherwise, the release of those records is covered by the Louisiana Revised Statutes § 15:574.12.<sup>102</sup>

The Department of Corrections has set up a system for keeping these records. A log will be kept in a computer documenting the nature of all requests, their relevant dates, and their dispositions at each step.<sup>103</sup> The individual requests and dispositions will also be kept in hardcopies filed at your institution or its headquarters.<sup>104</sup> And these records will be kept for at least four years after the institution settles your request.<sup>105</sup>

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<sup>96</sup> See LA. ADMIN. CODE tit. 22, § 325(G)(1)(b) (2017).

<sup>97</sup> See LA. ADMIN. CODE tit. 22, § 325(J)(1)(c) (2017).

<sup>98</sup> See LA. ADMIN. CODE tit. 22, § 325(J)(1)(c)(i)(a) (2017).

<sup>99</sup> See LA. ADMIN. CODE tit. 22, § 325(J)(1)(c)(i)(b) (2017).

<sup>100</sup> See LA. ADMIN. CODE tit. 22, § 325(F)(3)(a)(xi) (2017).

<sup>101</sup> See LA. ADMIN. CODE tit. 22, § 325(F)(3)(a)(xii) (2017).

<sup>102</sup> See LA. ADMIN. CODE tit. 22, § 325(F)(3)(b)(i) (2017).

<sup>103</sup> See LA. ADMIN. CODE tit. 22, § 325(F)(3)(b)(iii) (2017).

<sup>104</sup> See LA. ADMIN. CODE tit. 22, § 325(F)(3)(b)(iii)(b) (2017).

<sup>105</sup> See LA. ADMIN. CODE tit. 22, § 325(F)(3)(b)(iii)(c) (2017).

## Figure 1

### **The Administrative Remedy Procedure Process and Timeline**

#### **1. Incident Causing Injury or Danger—Day 1**

- After an incident occurs, read the ARP and this Chapter to find out if and how you should file a grievance complaint.
- You must attempt to resolve the matter informally before filing for Step 1.
- You have 30 days from the date of the incident to file your complaint with the Warden.

#### **2. Final Day to File a Step 1 Complaint—Day 30 (Day 1 in ARP)**

- Once filed, your complaint will go through the screening process.
- Once the Screening Officer passes your complaint, it will be investigated and decided by the Warden's Office.
- The Warden has 40 days from the date of your filing to send you a written decision.

#### **3. Final Day for the Warden to Return a Written Response to Your Step 1 Grievance— Day 70 (40 days in ARP)**

- Once returned to you, you will have 5 days to request a Step 2 appeal from the Warden's Step 1 decision with the ARP Screening Officer. The Screening Officer will send the appeal to the Secretary of the Department of Public Safety and Corrections.

#### **4. Final Day to File a Step 2 Appeal to the Step 1 Decision—Day 75 (45 days in ARP)**

- Once received, the Secretary of Public Safety and Corrections has 45 days to further investigate and send you a written response to your appeal with a final determination of your complaint.

#### **5. Final Day for the Office of the DPSC Secretary to Return a Written Response to Your Step 2 Appeal—Day 120 (90 days in ARP)**

- The Secretary of the Department of Public Safety and Corrections will send you a final written decision to your complaint will be sent to you by the Secretary of the Department of Public Safety and Corrections, and your administrative remedies will be exhausted.

## G. LOST PROPERTY CLAIMS

Lost property claims are common complaints by prisoners. But, as shown above in Part D, the ARP creates a separate administrative remedy procedure for the loss of property.<sup>106</sup> As a result, lost property complaints in Louisiana have their own administrative remedy requirements, even though lost property complaints in Louisiana state prisons (or jails) are technically part of the ARP.<sup>107</sup> The Administrative Remedy Procedure for Lost Property Claims (“LPC”) is in Section 369 (Part I) of Title 22 of the Louisiana Administrative Code. This Part will deal with (1) the filing requirements, (2) the LPC’s compensation procedure, and (3) claim denials.

### 1. Filing a Lost Property Claim

The LPC states that if you lose property, you may submit a lost property claim to the Warden on a “Form A” provided by your corrections institution.<sup>108</sup> That claim must include the date that you lost the property and a full statement of the circumstances that caused you to lose the property.<sup>109</sup> The claim must include a list of the missing items and the value of each lost item. In addition, the claim must include any proof of ownership or value of the property available to you.<sup>110</sup> You must submit all lost property claims to the Warden by the tenth day after you discovered the property was lost.<sup>111</sup> It is important to note, however, that you will not be compensated for any loss that you cannot account for. You will also not be compensated for a loss that occurred because of your own actions or for any loss that happened because of bartering, trading, selling, or betting with other prisoners.<sup>112</sup>

### 2. Compensation Procedure

Either the Warden or one of his designated officials will assign staff members to investigate your lost property claim. And that investigator will be in charge of submitting a report and his recommendations to the Warden regarding your LPC claim.<sup>113</sup> If the investigator finds that your property was lost because the facility was “negligent” (careless), your claim may be processed according to the below procedure provided by the LPC.<sup>114</sup>

#### a. Monetary Loss of Property

If your loss of property amounts to a loss of cash, the Warden’s office will recommend a “reasonable value” for the lost property (not including clothing) as described in Form A<sup>115</sup> (provided by your facility).<sup>116</sup> Once they determine the value, Forms B<sup>117</sup> and C<sup>118</sup> (provided by your institution) will be presented to you

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<sup>106</sup> See LA. ADMIN. CODE tit. 22, § 325(L) (2017).

<sup>107</sup> See LA. ADMIN. CODE tit. 22, § 325(L) (2017).

<sup>108</sup> See LA. ADMIN. CODE tit. 22, § 369(B) (2017).

<sup>109</sup> See LA. ADMIN. CODE tit. 22, § 369(B) (2017).

<sup>110</sup> See LA. ADMIN. CODE tit. 22, § 369(B) (2017).

<sup>111</sup> See LA. ADMIN. CODE tit. 22, § 369(B) (2017).

<sup>112</sup> See LA. ADMIN. CODE tit. 22, § 369(C) (2017).

<sup>113</sup> See LA. ADMIN. CODE tit. 22, § 369(D) (2017).

<sup>114</sup> See LA. ADMIN. CODE tit. 22, § 369(E) (2017).

<sup>115</sup> Forms A are lost property forms supplied by your corrections institution. These forms ask for your name and your Department of Corrections information. They also ask for a brief description of the items lost and the circumstances of their loss. These forms also contain reminders of the requirements for filing LPC claims. See LA. ADMIN. CODE tit. 22, § 369(G) (2017).

<sup>116</sup> See LA. ADMIN. CODE tit. 22, § 369(E)(1)(a) (2017).

<sup>117</sup> Forms B are the “Lost Property Claim Responses” in which the Warden states his response to a prisoner’s lost property claim. It provides information of the claim, the prisoner who made the claim, and the official who signed the response. Additionally, these forms contain the investigator’s determination and the recommendation. If the investigator denies your claim, the Form should state the reason why he denied your claim. The same is true if your claim is approved. See LA. ADMIN. CODE tit. 22, § 369(H) (2017).

<sup>118</sup> Forms C are agreements in which the prisoner accepts the resolution of his lost property claim after he receives the item or payment to cover for his loss. See LA. ADMIN. CODE tit. 22, § 369(I) (2017).



for you to sign. The staff member will then submit the claim to the assistant secretary of Adult Services at the DPSC for final approval.<sup>119</sup>

b. Non-Monetary Loss of Property

If your loss involves non-monetary losses (objects or personal items), the LPC treats your claim differently. If your lost item was a “state issued” item provided by your corrections institution, you only have the right to have your facility replace the stolen item when replacements are available.<sup>120</sup> If, on the other hand, your lost property is a clothing item, your facility may replace that lost item with a state issued replacement, but only if you entered the Department of Corrections system before March 31, 2000. If you entered the system after March 31, 2000, the state does not have to provide replacements.<sup>121</sup> Once the staff member investigates a claim and recommends a solution, the Warden’s office will review the claim and determine whether or not the institution is responsible.<sup>122</sup> Once the Warden’s office makes its determination, it will complete a Form B and submit it to you for you to sign.<sup>123</sup> Then, Form C will be completed and submitted to you for you to sign once the office offers you a state issue replacement.<sup>124</sup>

3. Claim Denials

If the Warden’s office determines that the institution is not responsible for your lost property, they will deny your claim and will return Form B to you explaining why they denied your claim.<sup>125</sup> If you are not satisfied with the Warden’s determination and wish to file an administrative appeal with the assistant secretary of Adult Services, you should state this on your Form B response. You should then submit your Form B response to your facility’s Screening Officer within 5 days after receiving the Warden office’s response.<sup>126</sup> The Screening Officer should send your appeal to the assistant secretary of Adult Services with a copy of your original Lost Property Form (Form A) and the Response Form (Form B). This appeal is the final step of the Lost Property Claim procedure.

## H. JUDICIAL REVIEW FOR STATE COURTS

As previously stated, Louisiana state law allows you to file a claim in state court against an ARP decision after you have worked through the entire grievance process. But whether the court can re-decide your grievance issue on its own, or whether the court has to be more limited in its review, depends on the type of grievance that you have filed.

The law allows state courts to review all injury or damages claims.<sup>127</sup> The law allows state courts to determine the entire claim if the issue involves civil law “delictual” claims (meaning claims like assault, battery, or other claims for “injury or damages”).<sup>128</sup>

However, many ARP grievances do not deal with these “delictual” issues. Rather, they deal with “non-delictual” issues, such as challenges to prison policies or departmental actions. For those types of claims, the law limits how much the court can review the claim.

These “non-delictual” claims can only be brought in the Nineteenth Judicial District Court.<sup>129</sup> That court will then review the ARP record. Once this occurs, the court can find that the ARP decision was correct

<sup>119</sup> See LA. ADMIN. CODE tit. 22, § 369(F) (2017).

<sup>120</sup> See LA. ADMIN. CODE tit. 22, § 369(E)(2)(a) (2017).

<sup>121</sup> See LA. ADMIN. CODE tit. 22, § 369(E)(2)(b) (2017).

<sup>122</sup> See LA. ADMIN. CODE tit. 22, § 369(E)(2)(c) (2017).

<sup>123</sup> See LA. ADMIN. CODE tit. 22, § 369(E)(2)(d) (2017).

<sup>124</sup> See LA. ADMIN. CODE tit. 22, § 369(E)(2)(e) (2017).

<sup>125</sup> See LA. ADMIN. CODE tit. 22, § 369(F) (2017).

<sup>126</sup> See LA. ADMIN. CODE tit. 22, § 369(F) (2017).

<sup>127</sup> LA. STAT. ANN. § 15:1177 (2017).

<sup>128</sup> LA. STAT. ANN. § 15:1177(A) (2017) (stating that judicial review limitations do not apply to “delictual actions for injury or damages”).

<sup>129</sup> LA. STAT. ANN. § 15:1177(A) (2017).

by affirming or agreeing with the ARP decision.<sup>130</sup> It can also send the issue back to the ARP for more investigation by “remanding” (returning) the claim.<sup>131</sup> But, if the court disagrees with the ARP decision, the court can “reverse or modify the decision” only if your “substantial rights” have been violated. Your “substantial rights” are violated when the administrative decisions are:

- 1) In violation of constitutional or legal provisions;
- 2) In excess of the statutory authority of the agency;
- 3) Made upon unlawful procedure;
- 4) Affected by other error of law;
- 5) Arbitrary or random or characterized by abuse of discretion; or
- 6) Manifestly erroneous in view of the whole record.<sup>132</sup>

You are allowed to make an oral argument on your claim in court (or speak to the judge about why he should approve your claim).<sup>133</sup> If you decide you want to make an oral argument, you must request it along with your court-petition for review, with a brief statement as to why the court should allow you to argue your claim orally.<sup>134</sup>

Although there are several things that courts can examine when they are reviewing ARP decisions, these standards of review are still more restricted than those involving injury or damages claims. In addition, you are limited geographically. If you are filing a “non-delictual claim” in state court, you can only bring these non-civil law claims in the Nineteenth Judicial District Court in Baton Rouge, Louisiana.<sup>135</sup> If you are in a parish jail (“under the physical custody of the sheriff”) then you must bring that claim in the district court that has jurisdiction over that parish.<sup>136</sup> However, if your grievance involves a delictual issue for injury or damages, you must bring that claim in the district court that covers the parish where the injury occurred.<sup>137</sup> Once the court has decided your claim, you can appeal that court’s decision, like most court cases, by filing an appeal with the next court of appeals.<sup>138</sup>

The court has broader powers of review if your claim is a delictual claim for injury or damages than if it is a non-delictual claim challenging a corrections department policy. As a result, if you file a delictual claim in state court, the court can review your entire claim. The court can also change any part of the ARP’s decision. The court is no longer limited to only reviewing the ARP record for the legal errors listed above. If you file a claim challenging a prison policy, the court can only review the ARP’s decision according to the standards listed above.

As stated in Chapter 15 of the main *JLM*, when you file a grievance through the ARP, it is important that you include all of the information that relates to the grievance, in case you have to argue the claim in a lawsuit later on. If you do not state an issue important to your grievance claim, a court may consider your claim “unexhausted.”<sup>139</sup> However, this does not mean that you can file several grievances at the same time. If you file more than one claim in the same grievance (or before another of your grievances is decided), the second claim will not be reviewed until the first claim or grievance is decided.<sup>140</sup> Be clear and descriptive when you file a claim, but do not file multiple claims at once. When you have used up all of your administrative remedies and are ready to file a complaint in federal court, make sure that your complaint states that you have already worked through all other remedies.

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<sup>130</sup> LA. STAT. ANN. § 15:1177(A)(8) (2017).

<sup>131</sup> LA. STAT. ANN. § 15:1177(A)(8) (2017).

<sup>132</sup> LA. STAT. ANN. § 15:1177(A)(9) (2017).

<sup>133</sup> LA. STAT. ANN. § 15:1177(A)(6)(a) (2017).

<sup>134</sup> LA. STAT. ANN. § 15:1177(A)(6)(a) (2017).

<sup>135</sup> LA. STAT. ANN. § 15:1177(A) (2017).

<sup>136</sup> LA. STAT. ANN. § 15:1177(A) (2017).

<sup>137</sup> LA. STAT. ANN. § 15:1184(F) (2017).

<sup>138</sup> LA. STAT. ANN. § 15:1177(A)(10) (2017).

<sup>139</sup> See *Lewis v. Stalder*, 2010-0143, p. 3 (La. App. 1 Cir. 6/11/10); 39 So. 2d 855 (holding that a state court’s legal review of an ARP decision “shall be limited to the issues presented in the petition for review and the administrative request filed at the agency level”).

<sup>140</sup> See LA. ADMIN. CODE tit. 22, § 325(F)(3)(ix) (2017) (“If an offender submits multiple requests during the review of a previous request, they will be logged and set aside . . .”).

## I. CONCLUSION

Your correctional facility's administrative remedy system gives you the opportunity to resolve your complaint most quickly and efficiently. And if you have a grievance, you *must* go through your facility's administrative system before going to either state or federal court. Once you receive a final decision from the administrative system, you may then file a claim in court. Remember that, if you do not go through your administrative remedies, your case will not be reviewed in court. This will happen even if you feel that the system in your facility is unfair or unhelpful. You must still use the entire procedure. These requirements may seem confusing or intimidating, but it is important that you do your best to go through the system and to meet as many of the requirements as you can. If you make an honest, good-faith effort to comply with the requirements, courts are more likely to excuse any mistakes. For example, if you miss a deadline, you should not give up. Continue to follow the grievance program and ask to be excused from the rule you did not follow, or ask to re-file your grievance and start over. The best approach is to go through the entire grievance system as well as you can. This will give you the best chance of resolving your issue, whether by grievance resolution, or by seeking legal action.

## CHAPTER 10: THE STATE’S DUTY TO PROTECT YOU AND YOUR PROPERTY— TORT ACTIONS\*

### A. INTRODUCTION

This Chapter explains your right to protect your body and property while you are in prison in Louisiana, and the steps you can take if you believe someone has violated those rights. Part B of this Chapter begins by introducing you to the general law of personal injury, called “tort law” (and sometimes called the law of *delict* in Louisiana). This Chapter will give you a brief overview of the law as it stands in Louisiana. If you want a more detailed explanation of what tort law is in general, you should see Chapter 17 of the main *JLM*. Part B of this Chapter will include common tort actions that prisoners may want to bring. Part C of this Chapter will explain how you can protect your rights with respect to administrative remedies and filing an original claim in court. This will cover the procedure for filing a claim in Louisiana and the steps you must take to file a lawsuit. This includes how to choose the right court, who you can sue, and the documents you must file. It also includes when and where to take each step in the process of bringing your lawsuit, the types of relief you may receive for your injury, and how you can appeal a decision that is not in your favor. Read this carefully and keep in mind that if you wait too long to file a claim or file it in the wrong place, you may lose your claim altogether.

At the end of this Chapter, there is an Appendix with a map of the judicial districts of Louisiana, followed by contact information for each of those districts. You should refer to this map and list of contact information while reading Parts C(2)(b) and C(3)(c) below. There are also three sample forms in the Appendix that you can make a copy of and use. The first form is for you to fill out before a trial if you are representing yourself. Your use of this form is explained in Part C(4). The second and third forms are to “Proceed *in Forma Pauperis*.” This means you will fill out these forms before a trial or an appeal, respectively, if you need to tell the court that you have no money. Your use of these forms is explained in Part C(3)(d).

### B. KNOW YOUR RIGHTS: TORT ACTIONS

In Louisiana, the law recognizes that, in general, people have a duty not to injure others and not to damage or destroy the property of others.<sup>1</sup> When someone breaks that duty, it is called a *tort*.<sup>2</sup> Acts that fall into the category of tort law are called “tortious conduct.” A person who commits an act of tortious conduct is called a “tortfeasor.”<sup>3</sup> Under tort law, you can seek a remedy for this injury or damage, usually in the form of money.<sup>4</sup>

Tort actions are civil actions, not criminal, but the same tortious conduct could potentially lead to criminal action as well.<sup>5</sup> This chapter just deals with the civil actions that are the result of tortious conduct. There are several types of torts: intentional, negligent, and constitutional. An “intentional tort” is when one person hurts another person or damages another person’s property on purpose (*see* Section 1 below). A “negligent tort” is often the result of a person failing to take proper precautions to protect other people and their property (*see* Section 2 below). A “constitutional tort” is the violation of your federal or state constitutional rights (*see* Section 3 below). You will need to know which of these types of torts you suffered in order to win your case.

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\* This Supplement Chapter was written by Stephanie Fine.

<sup>1</sup> LA. CIV. CODE ANN. art. 2315 (2017) (“Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.”).

<sup>2</sup> Black’s Law Dictionary 1626 (9th ed., 2009).

<sup>3</sup> Black’s Law Dictionary 1627 (9th ed., 2009).

<sup>4</sup> LOUISIANA CIVIL LAW TREATISE: TORT LAW, § 3.4 (2d ed., 2016).

<sup>5</sup> LOUISIANA CIVIL LAW TREATISE: TORT LAW, § 12.18 (2d ed., 2016).

Both *tort* and *delict* have been used to describe the same conduct.<sup>6</sup> This chapter will refer to it as tort, but you should be aware that the term “delict” could come up in the lawsuit process or on forms you need to fill out, and remember that it means the same thing.

## 1. Intentional Torts

Intentional torts happen when the tortfeasor intended to touch you or your property, intended to do the act that caused your injury, or otherwise intended to harm you or damage your property.<sup>7</sup> For most intentional torts, you must prove that you have an interest in the thing injured (such as your bodily integrity or your property) and that the tortfeasor's intentional act interfered with that interest.<sup>8</sup> This means that you must show: 1) that the tortfeasor hurt you or damaged your property, 2) that the tortfeasor acted intentionally, and 3) that the tortfeasor's actions were not privileged and that you did not consent to his actions.

For example, if a prison guard caused you physical pain because he intentionally took away your mattress for many months, or if a prison official intentionally took your book for no apparent reason, you may be able to prove that he committed an intentional tort.<sup>9</sup>

The most relevant types of intentional tort claims for your purposes can be broken down into two types of injuries: injuries to your body and damages to your property. A tort injury to your body is called “battery.”<sup>10</sup> Tort injuries to your property include “trespass to chattels” and “conversion.”<sup>11</sup> Each of these intentional torts is explained in Part (B)(4) below.

## 2. Negligent Torts

As with intentional torts, in which every person is responsible for his acts that injure others, with negligent torts a person is responsible for any injuries he causes by neglecting his duties or acting without proper care.<sup>12</sup> Unlike an intentional tortfeasor, a negligent tortfeasor does not intend to cause damage or injury. Instead, a negligent tortfeasor creates an unreasonably unsafe situation by doing something an ordinary person would not do, or by failing to take some precaution he should have taken. When this unreasonable behavior causes injury or destruction of property, it is a negligent tort.

In general, there are four elements to every negligent tort claim: duty, breach, causation, and damages.<sup>13</sup> Below is a brief introduction to each of these elements. For additional explanation, see Chapter 17 of the main *JLM*, “The State's Duty to Protect You and Your Property: Tort Actions.”

### a. Duty

“Duty” means that the person who injured you or damaged your property, the tortfeasor, must have had either a legal responsibility to protect you, or at least a legal responsibility to not injure you or damage your belongings.<sup>14</sup> Whether or not someone owes you a duty of care depends on the particular situation and your relationship to that person. For example, a supervisor in a job owes you a duty of care

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<sup>6</sup> LOUISIANA CIVIL LAW TREATISE: TORT LAW, § 1.4 (2d ed., 2016).

<sup>7</sup> Frank L. Maraist, *Of Envelopes and Legends: Reflections on Tort Law*, 61 LA. L. REV. 153, 157 (2000).

<sup>8</sup> LOUISIANA CIVIL LAW TREATISE: TORT LAW, § 12 (2d ed. 2016).

<sup>9</sup> *Peterson v. Gildon*, 40,328, p. 3 (La. App. 2 Cir. 12/30/05); 917 So. 2d 1284, 1287, *writ denied*, 2006-1098 (La. 10/27/06); 939 So. 2d 1277 (prisoner brought suits against prison officials for allegedly taking his books and his mattress, which caused him mental suffering and physical pain).

<sup>10</sup> Vernon Valentine Palmer, *The Fate of the General Clause in A Cross-Cultural Setting: The Tort Experience of Louisiana*, 46 LOY. L. REV. 535, 561–562 (2000).

<sup>11</sup> Vernon Valentine Palmer, *The Fate of the General Clause in A Cross-Cultural Setting: The Tort Experience of Louisiana*, 46 LOY. L. REV. 535, 561–562 (2000).

<sup>12</sup> LA. CIV. CODE ANN. art. 2316 (2017) (“Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill.”).

<sup>13</sup> LOUISIANA CIVIL LAW TREATISE: TORT LAW, § 8.1 (2d ed.; 2016); see also *Scott v. State*, 618 So. 2d 1053, 1059 (La. App. 1 Cir. 1993) *writ denied*, 620 So. 2d 881 (La. 1993).

<sup>14</sup> Black's Law Dictionary 580 (9th ed., 2009).

to maintain a safe workplace and you can therefore sue him if he fails to do so. A coworker, however, does not owe you that duty, and you could not sue him, even if he gave you a piece of defective equipment and you got injured using it.

As a prisoner, the state and its employees owe you a duty of care in most situations, meaning that they have some responsibility to protect you while you are in prison, and have the responsibility to not injure you or damage your property. For instance, if the prison facility assigns you construction work, the facility has a duty to make sure you are working in a safe environment.<sup>15</sup> To find out whether the state or a state employee owed you a duty of care, you should look for cases or laws that apply to your specific situation.

b. Breach

“Breach” means that the person who injured you or damaged your property, the tortfeasor, did not act in line with his duty to you.<sup>16</sup> For example, if you are injured, through no fault of your own, while doing the construction work mentioned above in Subsection (a), the state or prison breached its duty to you to provide you with a safe work environment.<sup>17</sup>

c. Causation

“Causation” means that when the tortfeasor took the action that led to the injury, the action he took directly caused the injury.<sup>18</sup> This element is the direct link between his action and your injury.<sup>19</sup> For instance, in the construction work example in Subsections (a) and (b) above, if something falls from the construction site and hits you, and you experience injury from this, the causation element is satisfied if you show that being hit by something at the construction site led directly to your injury.<sup>20</sup>

d. Damages

“Damages” means the extent of your injury.<sup>21</sup> To satisfy this element, you have to be able to show you were actually injured.<sup>22</sup> If the injury was to your body, you can prove bodily injury by evidence of the injury itself or your medical records documenting the injury.<sup>23</sup> If your property was damaged, you can show that the property is missing or broken and show the value of the property as it was before it broke or went missing.<sup>24</sup> Damages means that you need to show the damage that was done to you or your property.<sup>25</sup> In Louisiana, you must be able to show physical injury to you or physical damage to your property to recover damages for the tortious conduct (claiming mental or emotional injury alone is not enough).<sup>26</sup> For example, if you were injured while doing construction work, as in the example in

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<sup>15</sup> Pope v. State, 1999-2559, pp. 1–2 (La. 6/29/01); 792 So. 2d 713, 714 (prisoner brought suit when he was allegedly seriously injured while doing construction work assigned by prison officials).

<sup>16</sup> Black's Law Dictionary 213 (9th ed., 2009).

<sup>17</sup> Pope v. State, 1999-2559, pp. 1–2 (La. 6/29/01); 792 So. 2d 713, 714 (prisoner brought suit when he was allegedly seriously injured while doing construction work assigned by prison officials).

<sup>18</sup> LOUISIANA CIVIL LAW TREATISE: TORT LAW, § 4.6 (2d ed., 2016).

<sup>19</sup> LOUISIANA CIVIL LAW TREATISE: TORT LAW, § 4.6 (2d ed., 2016).

<sup>20</sup> Pope v. State, 1999-2559, pp. 1–2 (La. 6/29/01); 792 So. 2d 713, 714 (prisoner brought suit when he was allegedly seriously injured because a heavy piece of material fell on him while he was doing construction work assigned by prison officials).

<sup>21</sup> LOUISIANA CIVIL LAW TREATISE: TORT LAW, § 4.7 (2d ed., 2016).

<sup>22</sup> LOUISIANA CIVIL LAW TREATISE: TORT LAW, § 21.6 (2d ed., 2016).

<sup>23</sup> LOUISIANA CIVIL LAW TREATISE: TORT LAW, § 15.41 (2d ed., 2016).

<sup>24</sup> LOUISIANA CIVIL LAW TREATISE: TORT LAW, § 4.7 (2d ed., 2016).

<sup>25</sup> LOUISIANA CIVIL LAW TREATISE: TORT LAW, § 4.7 (2d ed., 2016).

<sup>26</sup> LA. REV. STAT. ANN. § 15:1184 (2017) (“No prisoner suit may assert a claim under state law for mental or emotional injury suffered while in custody without a prior showing of physical injury.”).

Subsections (a), (b), and (c) above, you could show your medical records, which include the surgeries and hospitalization you received.<sup>27</sup>

e. Example—Proving Duty, Breach, Causation and Damages

To prove a negligent tort, you must first show that the tortfeasor had a responsibility to keep you from being injured, called a “duty of care.” With negligent torts, the focus is on the duty element,<sup>28</sup> as the person who caused your injury must have owed you a duty of care in order for you to recover.<sup>29</sup> For example, if a prison guard sprayed a chemical outside your cell, and exposure to it makes you severely sick or aggravates a medical condition (like a heart condition) that the prison knows about, the prison guard neglected his duty to you to provide a safe environment. The prison guard or facility may be responsible to you for a negligent tort in failing to maintain safe premises.<sup>30</sup>

Second, you must show that the tortfeasor breached this duty of care by acting negligently, or failing to do what a reasonable person would have done in that situation.<sup>31</sup> With negligent torts, the breach element is important because the tortfeasor must have breached his duty of care to you. This element is also called “fault,” meaning that if the prison guard sprayed the chemical near your cell even though he knew about your heart condition, as in the example above, it may have been his fault, or breach of duty of care, that led to your injury.<sup>32</sup>

In proving the element of breach, you must show that your injury was “foreseeable,” meaning that a reasonable person would have known that the tortfeasor’s behavior could cause the type of injury that you suffered. You must show your injury was predictable apart from the fact that you ended up injured; in other words, you cannot use the fact that you were injured to show that an injury was foreseeable. In the chemical spraying example above, the prison owes you a duty of care to keep a safe environment.<sup>33</sup> Injury from a chemical spray by prison officials would be foreseeable if you have a pre-existing condition (that the prison is aware of).<sup>34</sup>

Causation is another important element of negligent torts, as you must prove that the tortfeasor’s mistake was the “cause-in-fact” of your injury.<sup>35</sup> In the chemical spraying example, you would have to

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<sup>27</sup> Pope v. State, 1999-2559, n.1 (La. 6/29/01); 792 So. 2d 713, 714 n.1 (1999-2559 La. 6/29/01) (prisoner who brought suit when he was allegedly seriously injured while doing construction work could show medical records of his hospitalization and surgeries).

<sup>28</sup> Black v. State Through Dep’t. of Pub. Safety & Corr., 94-1305, p. 6 (La. App. 3 Cir. 5/17/95); 657 So. 2d 270, 274, *writ denied*, 95-1546 (La. 9/29/95); 660 So. 2d 876 (“the plaintiff must prove that defendant owed a duty to the plaintiff, the requisite duty was breached by the defendant, the risk of harm was within the scope of protection afforded by the duty breached, and the conduct in question was a cause-in-fact of the resulting harm”).

<sup>29</sup> Scott v. State, 618 So. 2d 1053, 1059 (La. App. 1 Cir. 1993) *writ denied*, 620 So. 2d 881 (La. 1993) (“prison authorities owe a duty to use reasonable care to protect inmates from harm . . . . This duty is not absolute, but depends upon the circumstances of the particular case.”).

<sup>30</sup> Vincent v. Creed, 38,120, p. 1 (La. App. 2 Cir. 12/30/05); 917 So. 2d 1289, 1290 (prisoner brought suit when his heart condition was aggravated and he suffered severe chest pains because the prison guard negligently sprayed another prisoner with a chemical near his cell).

<sup>31</sup> Negligence is defined as the “[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.” Black’s Law Dictionary 1133 (9th ed., 2009); *see also* Black’s Law Dictionary 1627 (9th ed., 2009) (defining negligent tort).

<sup>32</sup> Vincent v. Creed, 38,120, p. 1 (La. App. 2 Cir. 12/30/05); 917 So. 2d 1289, 1290 (prisoner brought suit when his heart condition was aggravated and he suffered severe chest pains because the prison guard negligently sprayed another prisoner with a chemical near his cell).

<sup>33</sup> Scott v. State, 618 So. 2d 1053, 1059 (La. App. 1 Cir. 1993) *writ denied*, 620 So. 2d 881 (La. 1993).

<sup>34</sup> Vincent v. Creed, 38,120, p. 1 (La. App. 2 Cir. 12/30/05); 917 So. 2d 1289, 1290 (prisoner brought suit when his heart condition was aggravated and he suffered severe chest pains because the prison guard negligently sprayed another prisoner with a chemical near his cell).

<sup>35</sup> State *ex rel.* Jackson v. Phelps, 95-2294, p. 3 (La. 4/8/96); 672 So. 2d 665, 666–667 (“[P]laintiff must prove that the conduct in question was a cause-in-fact of the resulting harm, the defendant owed a duty of care to plaintiff, the requisite duty was breached by the defendant, and the risk of harm was within the scope of protection afforded by the duty breached.”).

show that the chemicals sprayed led directly to your injury and that your injury was not caused by other factors.<sup>36</sup>

The element of damage is the same as with intentional torts: you must show how badly you were actually injured by the negligent tort.<sup>37</sup> For instance, in the chemical spraying example, you would want to show medical records or other evidence of your aggravated condition.

There are several negligent torts particularly important to prisoners, including medical negligence and negligently maintained premises. Each of these negligent torts is explained in more detail in Part B(4) below.

### 3. Constitutional Torts

The violation of your constitutional rights constitutes another type of tort. The state officers and employees you encounter have the same duty not to harm you and your property that other citizens have. However, because they are state actors, they also have a duty not to violate your federal or state constitutional rights.

A federal law, 42 U.S.C. § 1983, allows you to sue state and city prison or jail officials and guards (but not federal officials) if they deprive you of your federal constitutional rights (like your right to adequate medical care, to be free from assault, and to have access to the courts and to legal materials). If you believe your federal constitutional rights have been violated, you should read Chapter 17 of the main *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions,” Part B(3)(b), as well as Chapter 13 of the main *JLM*, “Federal Habeas Corpus,” and Chapter 16 of the main *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law.”

If you believe your state constitutional rights have been violated, you may wish to sue the state or state actors. To prove a constitutional tort against the state, you must show that the state harmed you and that the state’s actions violated specific rights listed in the state constitution. For example, you can sue the state government if the state takes your property without a legitimate reason.<sup>38</sup> For your constitutional rights in Louisiana, *see* the Louisiana Constitution of 1974.<sup>39</sup>

### 4. Examples of Common Tort Actions

This Section describes various torts that can happen in prison and the elements you must prove to win damages for these torts.

#### a. Injuries Relating to Work and Work-Release Programs

Injuries sustained during the course of work within the prison or while on work release are considered work injuries. Tort actions under this category include the state’s failure to provide reasonably safe equipment, as well as the state’s failure to warn prisoners of specific dangers they might face when using the equipment.<sup>40</sup>

Like the example detailed in Part B(2), in one case a prisoner brought a suit when he was assigned by prison officials to do construction work, and allegedly, through no fault of his own, he was hit

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<sup>36</sup> *Vincent v. Creed*, 38,120, p. 1 (La. App. 2 Cir. 12/30/05); 917 So. 2d 1289, 1290 (prisoner brought suit when his heart condition was aggravated and he suffered severe chest pains because the prison guard negligently sprayed another prisoner with a chemical near his cell).

<sup>37</sup> LOUISIANA CIVIL LAW TREATISE: TORT LAW, § 4.7 (2d ed., 2016).

<sup>38</sup> LA. CONST. art. I, § 4 (“Property shall not be taken or damaged by the state or its political subdivisions . . .”).

<sup>39</sup> Louisiana Constitution of 1974, *available at* <http://senate.legis.state.la.us/documents/constitution/constitution.pdf> (last visited Jan. 11, 2018).

<sup>40</sup> *Duhon v. Calcasieu Parish Police Jury*, 517 So. 2d 1016, 1018 (La. App. 3 Cir. 1987) (prisoner brought a suit against officials for personal injuries that occurred while he was working as a farm crew member in the work program).



and injured by a heavy piece of material at the construction site.<sup>41</sup> The prisoner allegedly sustained this injury during this work because the state did not provide a safe working environment.

b. Medical Care Provided to Prisoners

Claims relating to inadequate or inappropriate medical care are negligence claims. The state has a duty to provide prisoners with reasonable and adequate medical care in a timely manner. Medical negligence may be a negligent tort when the prison owes you a duty to make sure that you have proper medical care, and breaches that duty, directly leading to your injury. This can happen if you are injured or sick and the prison does not give you proper medical attention, which makes your injury or illness worse. If you believe the state has violated this duty towards you in a way that caused you real harm, you may have a successful medical tort claim.

For example, one court granted a prisoner damages when the prison failed to give the prisoner a bland diet, even though several doctors prescribed it, and therefore the prisoner had to have most of his stomach removed. The court found that the prison breached its duty to provide adequate medical treatment to the prisoner, and the prisoner was injured by this breach.<sup>42</sup>

In order to pursue a tort claim for medical negligence, you will have to prove that the treatment the state gave you (or failed to give you) was not standard for medical practice. Second, you will have to prove that the state's action or inaction directly caused your injury and that the injury would not have happened otherwise.<sup>43</sup> For more information, see Chapter 14 of the *Louisiana State Supplement*, "Your Right to Adequate Medical Care."

c. Destruction or Loss of Prisoner Property

State employees have an obligation not to take, damage, or destroy your property without just cause—whether intentionally or through negligence. If they do, you may be able to sue the state.

"Trespass to chattels" is another way to say that your property was damaged in some way.<sup>44</sup> If a person damages your property, and you did not give him permission to touch or use your property, that may qualify under the tort of trespass to chattels.<sup>45</sup>

"Conversion"<sup>46</sup> occurs when a person intentionally takes another person's possessions as his own.<sup>47</sup> If someone takes your belongings and keeps them as his own, that may qualify under the tort of conversion if you did not give him permission to take it and he had no legal reason to do it.

For example, if a prison official takes your book and tears it or keeps it for no legitimate reason, and you did not tell him it was okay to touch or take it, you may have a tort claim for trespass to chattels or conversion.<sup>48</sup> Similarly, a prisoner brought a suit against prison officials when "all his mail and stamps were confiscated, his law books were taken, other personal property including clothing, a bible and prescription medication were removed from his possession without him being given a property slip."<sup>49</sup>

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<sup>41</sup> Pope v. State, 1999-2559, p. 2 (La. 6/29/01); 792 So. 2d 713, 714.

<sup>42</sup> Brown v. State, Through Dep't of Corr., 354 So. 2d 633, 634 (La. App. 1 Cir. 1977).

<sup>43</sup> Brown v. State, Through Dep't of Corr., 354 So. 2d 633, 635 (La. App. 1 Cir. 1977) (finding that there was "a causal relationship between the duty, the breach of duty, and the damages suffered by the plaintiff," so the state was responsible for medical negligence).

<sup>44</sup> FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., LOUISIANA TORT LAW, § 2.07(8) (2013).

<sup>45</sup> LOUISIANA CIVIL LAW TREATISE: TORT LAW, § 12.12 (2d ed., 2016).

<sup>46</sup> Vernon Valentine Palmer, *The Fate of the General Clause in A Cross-Cultural Setting: The Tort Experience of Louisiana*, 46 LOY. L. REV. 535, 561–562 (2000).

<sup>47</sup> LOUISIANA CIVIL LAW TREATISE: TORT LAW, § 12.12 (2d ed., 2016).

<sup>48</sup> Peterson v. Gildon, 40,328, p. 3 (La. App. 2 Cir. 12/30/05); 917 So. 2d 1284, 1287, writ denied, 2006-1098 (La. 10/27/06); 939 So. 2d 1277 (prisoner brought suit against prison officials for allegedly taking his books).

<sup>49</sup> Gray v. State, 2005-617, p.7 (La. App. 3 Cir. 2/15/06); 923 So. 2d 812, 818.

If your items were stolen from you, you may be able to hold the state responsible for failing to provide adequate security in the area from which your property was taken. If you believe that prison officials have intentionally or negligently taken or destroyed your property without permission or authorization, refer to Part B(1)–(3) above, and to Part C below for remedies. If you believe that your property was destroyed due to negligently maintained prison facilities, *see* Section B(4)(d) below.

#### d. Negligently Maintained Prison Facilities

As with injuries in the workplace, the state is not responsible for preventing all injuries that could occur on its property.<sup>50</sup> The state is only responsible for maintaining facilities in a “reasonably safe condition.” To determine what reasonably safe means, a court might consider how likely it was that an injury would occur, how serious that injury was likely to be, and how much it would have cost the state to prevent the injury.

#### e. Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress occurs when a person’s intentional act makes another person suffer mentally.<sup>51</sup> Intentional infliction of emotional distress is more difficult to prove and still requires that you show an underlying physical injury in addition to your mental suffering.<sup>52</sup> If someone hurts you, and you suffer physically and mentally, you may be able to bring a claim for intentional infliction of emotional distress with another claim for your physical injury.

#### f. Excessive Force and Failure to Protect

Perhaps the most common tort lawsuits by prisoners are those alleging that corrections officers used excessive force against them or failed to protect them from other prisoners. “Battery” is when “harmful or offensive contact” occurs.<sup>53</sup> This means that someone touches your body in a harmful or offensive way, resulting in an injury.<sup>54</sup> Particularly important battery claims for prisoners include unjustified body cavity searches or other physical harm from prison guards.<sup>55</sup> Prisoner claims based on the prison’s or official’s failure to protect are usually caused by other prisoner’s actions.<sup>56</sup> Actions to recover for excessive force and failure to protect are covered in detail in Chapter 24 of the main *JLM*, “Your Right to be Free From Assault.”

### C. PROTECTING YOUR RIGHTS

If you believe you have been injured or your property has been damaged due to someone’s intentional or negligent tort action, you should follow the steps below. This section provides an overview of the ways that you can go about seeking relief for your tort claim. It covers both administrative remedies available through the prison and remedies available through the courts. Start by exhausting any administrative remedies available to you, as detailed in Section 1. If necessary, after exhausting your administrative remedies, you can file a lawsuit, per Sections 2, 3, and 4 below. Finally, Section 5 explains the process to appeal a decision in your lawsuit that is not in your favor.

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<sup>50</sup> *Duhon v. Calcasieu Par. Police Jury*, 517 So. 2d 1016, 1018 (La. App. 3 Cir. 1987).

<sup>51</sup> Vernon Valentine Palmer, *The Fate of the General Clause in A Cross-Cultural Setting: The Tort Experience of Louisiana*, 46 LOY. L. REV. 535, 561 (2000).

<sup>52</sup> LA. REV. STAT. ANN. § 15:1184(E) (2017).

<sup>53</sup> Vernon Valentine Palmer, *The Fate of the General Clause in A Cross-Cultural Setting: The Tort Experience of Louisiana*, 46 LOY. L. REV. 535, 561 (2000).

<sup>54</sup> Frank L. Maraist, *Of Envelopes and Legends: Reflections on Tort Law*, 61 LA. L. REV. 153, 157 (2000).

<sup>55</sup> *See Spooner v. E. Baton Rouge Par. Sheriff Dep’t*, 2001-2663, p. 2 (La. App. 1 Cir. 11/8/02); 835 So. 2d 709, 710 (prisoner alleged the Deputy Sheriff committed assault and battery against him).

<sup>56</sup> *See Poullard v. Michael*, 38,363, p. 1 (La. App. 2 Cir. 4/7/04); 870 So. 2d 481, 481 (prisoner filed a tort suit against prison officials for failure to protect him after he was stabbed by another prisoner and officials had been given advanced warning); *see also Ngo v. Estes*, 2004-186, p.1 (La. App. 3 Cir. 9/29/04); 882 So. 2d 1262, 1263 (prisoner brought suit alleging that prison officials failed to protect him from several unprovoked attacks by another prisoner who had attacked him before).

## 1. Exhaustion of Administrative Remedies

You must go through the Administrative Remedy Procedure before filing in court. It is likely that there are administrative remedies available to you in prison, but each prison may adopt its own remedies, so you should inquire at your institution.<sup>57</sup> You should pursue all possible administrative remedies available to you as your first step in seeking a remedy for your tort claim.<sup>58</sup> Before you even consider filing a claim in state or federal court, as detailed below, you should be sure to exhaust all administrative remedies.<sup>59</sup> Be sure to initiate your administrative claims within 90 days from the day the injury happened at the latest, or you may not be allowed to bring your claim.<sup>60</sup> Generally, the rule is that you should bring your claim as soon as possible—the sooner the better. Do not wait until the deadline.

For more information on pursuing your administrative remedies, *see* Chapter 9 of this Supplement, “Administrative Remedy Procedures.” Chapter 14 of the main *JLM*, “The Prison Litigation Reform Act,” may also be helpful.

Once you have exhausted your administrative remedies, if you believe you have not received an adequate remedy to your injury, you can then file a suit in state or federal court as an original claim.

## 2. Filing an Original Claim in Court

After you have exhausted your administrative remedies, if you are unsatisfied, you may file an original tort claim for injury or damages in federal or state court.<sup>61</sup> This section explains how to do this, step-by-step.

### a. Getting Help from a Lawyer

Since a tort claim is a civil action, not a criminal action, you do not have the right to a lawyer.<sup>62</sup> The court may choose to appoint an attorney to represent you if you are indigent (which means you cannot afford a lawyer) without making you pay for the attorney. But the court does not have to do this. If the court does not give you a lawyer, it may be hard to find a lawyer who will take your case. If it seems likely that you will win a large amount of money from the State, you may be able to find a private attorney to represent you on a “contingency fee” basis. A “contingency fee” means the attorney charges you only if you win the case.<sup>63</sup> If you win, the attorney takes his fee, and any other costs of representing you, from your

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<sup>57</sup> LA. REV. STAT. ANN. § 15:1171 (2001), *invalidated by* Pope v. State, 99-2559 (La. 06/29/01); 792 So. 2d 713. Although *Pope* held the administrative remedy exhaustion requirement as applied to tort action unconstitutional, Louisiana courts have still consistently refused to grant judicial review in prisoner-initiated tort cases when administrative remedies have not been exhausted according to the procedures established in §§ 15:1171-15:1179. *See Walker v. Appurao*, 2009-0821, p. 4 (La. App. 1 Cir. 10/23/09); 29 So. 3d 575.

<sup>58</sup> La. Dist. Ct. R. 60.0(A) (2012).

<sup>59</sup> LA. REV. STAT. ANN. § 15:1184(A)(2) (2017) (“No prisoner suit shall assert a claim under state law until such administrative remedies as are available are exhausted.”).

<sup>60</sup> LA. REV. STAT. ANN. § 15:1172(B)(1) (2001) (“An offender shall initiate his administrative remedies for a delictual action for injury or damages within ninety days from the day the injury or damage is sustained.”), *invalidated by* Pope v. State, 99-2559 (La. 06/29/01); 792 So. 2d 713. Although *Pope* held invalid the administrative remedy exhaustion requirement as applied to tort action, Louisiana courts have still consistently refused to grant judicial review in prisoner-initiated tort cases when administrative remedies have not been exhausted, *see Gray v. State*, 2005-617, p. 2 (La. App. 3 Cir. 2/15/06); 923 So. 2d 812, 815; *Jackson v. State*, 2011-1719, p. 9 (La. App. 1 Cir. 3/23/12); 92 So. 3d 391, 396.

<sup>61</sup> LA. REV. STAT. ANN. § 15:1177(C) (2001) (“Delictual actions for injury or damages shall be filed separately as original civil actions.”), *invalidated by* Pope v. State, 99-2559 (La. 06/29/01); 792 So. 2d 713. Although *Pope* held invalid the administrative remedy exhaustion requirement as applied to tort action, Louisiana courts have still consistently refused to grant judicial review in prisoner-initiated tort cases when administrative remedies have not been exhausted, *see Garrison v. State ex rel. Dep’t. of Corr.*, 2010-1570, p. 2 (La. App. 1 Cir. 3/25/11).

<sup>62</sup> In a criminal case, you have the constitutional right to a court-appointed lawyer. The Sixth Amendment to the Constitution guarantees you “the assistance of counsel” in preparing your defense. *See Douglas v. California*, 372 U.S. 353, 357–358, 83 S. Ct. 814, 816–817, 9 L. Ed. 2d 811, 814–815 (1963) (finding that a state must provide counsel for an indigent defendant in a first appeal from a criminal conviction).

<sup>63</sup> Black’s Law Dictionary 362 (9th ed., 2009).

award. Usually the attorney's fee will be a percentage of the money you win.<sup>64</sup> If you would like to try to find a lawyer to help you with your tort claim, see Chapter 4 of the main *JLM*, "How to Find a Lawyer," for information on how to get a lawyer. You may also be able to find an attorney through local Louisiana associations of attorneys. In the Appendix, you can find contact information for different Louisiana associations that may be able to help you if you explain your situation. If you get a lawyer, he should know the procedures explained below, but you should still read them carefully so you know the steps you and he will be following.

If you cannot find a lawyer, you may represent yourself. This is called proceeding *pro se*. For more information on proceeding *pro se*, see Chapter 6 of the main *JLM*, "An Introduction to Legal Documents," Part A, "The Right and Responsibilities of Self-Representation." If you choose to represent yourself, carefully read and follow the steps explained below.

#### b. Choosing Federal or State Court

When you are ready to bring a lawsuit, the first step is choosing the court to bring the lawsuit in. For more information on choosing a court, read Chapter 5 of the main *JLM*, "Choosing a Court and a Lawsuit: An Overview of the Options." The information below is most useful for a tort claim.

If you are in a federal prison and the tort happened in the federal prison, you should file in the Federal District Court under the Federal Tort Claims Act. For instructions on how to file a tort claim in federal district court, read Chapter 17 of the main *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions."

If you are in a Louisiana state prison, the tort happened there, and you have used all of your administrative remedies but they did not work, you may be able to file suit in the State District Court.<sup>65</sup> It is very hard to win in a tort suit, so make sure your case is strong before you bring a suit. Once you choose to bring a suit, the first thing you need to do is find your district court. You should file your claim in the district court of the district where the tort happened. This means you should file in the district where your prison is at the time the tort happened.<sup>66</sup> In the Appendix, you will find a map of all the state districts. You can use this map to find out which district your prison is in. You will see that the map has a number in each district. The numbers on the map are the numbers of each district in the list of all the state districts. This list is organized by parish and is also in the Appendix.

#### c. Whom You Can Sue

You may file a tort action in state court against a person who deliberately or carelessly injured you. Deliberately means someone chose to hurt you and knew that you would be hurt. Carelessly means they did not care that you would be hurt. You can also file a tort suit against someone who broke or damaged your property. Because the tort happened in prison, you can choose who you want to bring a tort suit against: a prison guard or prison official, a private prison, or the State or State officials.<sup>67</sup>

Most of the time, bringing a suit against an individual is easy. But it is harder to bring a suit against a prison guard, official, the State, or a state official. If you bring a suit against a prison guard or official, a rule called *respondeat superior* will likely apply. *Respondeat superior* means that both the

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<sup>64</sup> Black's Law Dictionary 362 (9th ed., 2009).

<sup>65</sup> LA. REV. STAT. ANN. § 15:1184(A)(2) (2017) ("No prisoner suit shall assert a claim under state law until such administrative remedies as are available are exhausted.")

<sup>66</sup> LA. REV. STAT. ANN. § 15:1184(F) (2017) ("The exclusive venue for delictual actions for injury or damages shall be the parish where the prison is situated to which the prisoner was assigned when the cause of action arose. Upon consent of all parties, the court may transfer the suit to a parish in which venue would otherwise be proper.")

<sup>67</sup> See *Gray v. State*, 2005-617, p. 1 (La. App. 3 Cir. 2/15/06); 923 So. 2d 812, 814 (prisoner brought suit against correctional center, warden, and other officials); see also *Pope v. State*, 1999-2559, p. 1 (La. 6/29/01); 792 So. 2d 713, 714 (prisoner brought action against the State of Louisiana); see also *Peterson v. Gildon*, 40,328, p. 1 (La. App. 2 Cir. 12/30/05); 917 So. 2d 1284, 1286, writ denied, 2006-1098 (La. 10/27/06); 939 So. 2d 1277 (prisoner brought suit against corrections official and wardens).

person you brought the claim against and the State itself are liable for the tort.<sup>68</sup> Liable means that the person and the State are responsible for the tort. It is like being guilty in a criminal case. If you bring a suit against the prison or any relevant local government officials, the State will likely be liable for the tort as well.<sup>69</sup> Officials may also be held liable under *respondeat superior* when other prisoners injure you.<sup>70</sup> Luckily, Louisiana has said in its Constitution that courts can find the State responsible for tort actions.<sup>71</sup>

Of course, the facts of your case are very important. The court will look at the facts when it decides whether the State is liable for your injury.<sup>72</sup> In the past, officers and the State have been held responsible for intentional torts they caused. Intentional torts are torts that the officer or State meant to do. Officers and the State have also been held responsible for negligent torts.<sup>73</sup> Negligent torts mean a tort that happened because the officer or State did not do their job right. Officers and the State have a duty to keep you and other prisoners safe. If they do not do this, then they are negligent. If this causes you to be injured, then you may sue the officer and the State for a negligent tort.

#### d. Types of Relief

If you prove that you were the victim of a tort, whether intentional or negligent, the court will order the tortfeasor to compensate you for the loss you suffered. Compensating you means paying you back for the harm done. Most often it means the tortfeasor pays you money. This court-ordered payment is called *damages*.<sup>74</sup> A court may award you three kinds of damages: compensatory, punitive, and nominal.<sup>75</sup> You do not need to tell the court the amount of money you want. But you can ask the court to give you the amount of damage the court thinks is reasonable and the court will award the right amount.<sup>76</sup> The court can also give you injunctive relief. This means the court orders the tortfeasor to stop doing whatever is injuring you or damaging your property.

##### i. *Compensatory Damages*

Compensatory damages are the most common type of damages. Compensatory damages try to match the amount of your loss.<sup>77</sup> The court can order payment for your property damages or order payments to compensate you for your pain and suffering. These damages can also pay you back for the period after the injury when you are still suffering.<sup>78</sup> For example, look at the case of the prisoner who had to have most of his stomach taken out from Part B(4)(b) above. The court awarded the prisoner money to compensate for the fact that he would live the rest of his life with only a third of his stomach; he had to change how he lived his life and how he ate because of his smaller stomach.<sup>79</sup>

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<sup>68</sup> LA. CIV. CODE ANN. art. 2320 (1996) (“Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed.”); *see also* *Zeitoun v. City of New Orleans*, 2011-0479, p. 14 (La. App. 4 Cir. 12/7/11); 81 So. 3d 66, 76, *reh’g denied* (Jan. 19, 2012) (plaintiffs “failed to satisfy their burden to establish a cause of action . . . under the theory of *respondeat superior*”).

<sup>69</sup> *See* David W. Robertson, *Tort Liability of Governmental Units in Louisiana*, 64 TUL. L. REV. 857, 876 (1990).

<sup>70</sup> *Duhon v. Calcasieu Par. Police Jury*, 517 So. 2d 1016 (La. App. 3 Cir. 1987) (holding sheriff liable under *respondeat superior* for prisoner’s injury caused by another prisoner’s negligent driving of a tractor).

<sup>71</sup> LA. CONST. art. XII, § 10 (“Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.”).

<sup>72</sup> *State ex rel. Jackson v. Phelps*, 95-2294, p. 3 (La. 4/8/96); 672 So. 2d 665, 667 (“Whether the state breached its duty will depend on the facts and circumstances of each case.”).

<sup>73</sup> *Barlow v. City of New Orleans*, 257 La. 91, 99, 241 So. 2d 501, 504 (1970).

<sup>74</sup> Black’s Law Dictionary 445 (9th ed., 2009).

<sup>75</sup> For more information on damages, *see* Chapter 16 of the main *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law.”

<sup>76</sup> LA. CODE CIV. PROC. ANN. art. 893 (2017) (“No specific monetary amount of damages shall be included in the allegations or prayer for relief of any original, amended, or incidental demand. The prayer for relief shall be for such damages as are reasonable . . .”).

<sup>77</sup> *Compensatory Damages*, Black’s Law Dictionary (10th ed., 2014).

<sup>78</sup> *Compensatory Damages*, Black’s Law Dictionary (10th ed., 2014) (defining “discretionary damages” as damages “such as mental anguish or pain and suffering”).

<sup>79</sup> *Brown v. State, Through Dep’t. of Correction*, 354 So. 2d 633, 635–636 (La. App. 1 Cir. 1977).

## ii. *Punitive Damages*

Punitive damages are court-ordered payments that are more than compensatory damages. They are extra damages.<sup>80</sup> These damages are generally awarded when the court thinks the tort was “aggravated” or made worse. A tort can be aggravated, or made worse, by violence, oppression, malice, fraud, or wanton and wicked conduct by the tortfeasor.<sup>81</sup> Oppression means cruel treatment. Malice means the tortfeasor meant to harm you. Fraud means the tortfeasor lied to or tricked you or someone. Wanton and wicked conduct means the tortfeasor acted badly.

Punitive damages are meant to punish the tortfeasor. They are not meant to pay you back for your injury.<sup>82</sup>

## iii. *Nominal Damages*

Nominal damages are very small amounts of money. A court will give you nominal damages if they think your right has been violated, but you have no injury the court can order compensation for.<sup>83</sup> A court may also give you nominal damages when you have an injury, but the evidence doesn't show how injured you were.<sup>84</sup>

## iv. *Injunctive Relief*

Other than these monetary awards, the court may order the tortfeasor to take or stop certain actions.<sup>85</sup> This is called an *injunction*.<sup>86</sup>

# 3. **Filing Requirements**

## a. Time Limit

You have to file your lawsuit within one year of the injury. The only exception is if you did not know about the injury because of something out of your control.<sup>87</sup> This means that on the day you are injured, the clock begins ticking and you must file your claim within a year. Like with administrative remedies, the sooner you file, the better. So, do not wait to the last minute to file.

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<sup>80</sup> Black's Law Dictionary 474 (10th ed., 2014).

<sup>81</sup> See RESTATEMENT (SECOND) OF TORTS § 908 (Am. Law Inst. 1979) (“(1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future. (2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.”).

<sup>82</sup> *Punitive Damages*, Black's Law Dictionary (10th ed., 2014).

<sup>83</sup> *Nominal Damages*, Black's Law Dictionary (10th ed., 2014).

<sup>84</sup> *Nominal Damages*, Black's Law Dictionary (10th ed., 2014).

<sup>85</sup> LA. REV. STAT. ANN. § 15:1182(B) (2017) (“In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm . . . . Preliminary injunctive relief shall automatically expire ninety days after its entry, unless the court makes the findings required under Subsection A for the entry of prospective relief and makes the order final before the expiration of the ninety-day period.”).

<sup>86</sup> For more discussion of injunctive relief, see Chapter 16 of the main *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law.”

<sup>87</sup> LA. CIV. CODE ANN. art. 3492 (2017) (“Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained.”); *Corsey v. State*, 375 So. 2d 1319, 1322 (La. 1979).

The only exception to this time limit is if you reasonably did not know about your injury because of something you could not control.<sup>88</sup> For example, if the tortious action caused you to be mentally unaware for a period of time, your one year time limit will likely be extended to one year after you are better and can learn about the injury and file a claim.<sup>89</sup>

You may have to file your lawsuit later than one year after the injury because you first used administrative remedies. If this happens, a court might still allow you to file your lawsuit if you do it right after trying your administrative remedies.<sup>90</sup>

#### b. Documents to File

When you are ready to bring your lawsuit, you must write a document called a *pleading*.<sup>91</sup> There are no technical requirements for your pleading, but you should make sure to keep it simple.<sup>92</sup> Make separate paragraphs for every topic or idea you cover, and number each paragraph.<sup>93</sup> In this pleading, you should include:

- 1) Your First and Last Names;
- 2) The Place Where You Are Currently Incarcerated (address);
- 3) What Happened (include all the facts and be sure to include Time and Place);<sup>94</sup>
- 4) The Extent of Your Injury or Property Damage (how injured you are or how damaged your property is);<sup>95</sup>
- 5) The Type of Suit You Are Bringing;
- 6) Your Address for Receiving Mail/Packages; and
- 7) The Type of Relief You Want (monetary relief or an injunction).<sup>96</sup>

Once you have finished writing your pleading, sign your name on the bottom of the pleading and include your mailing address.<sup>97</sup> Your signature is your promise that you are not filing the suit for a wrong purpose (such as to harass an official or to scam the system). Your signature is also a statement that your suit is not frivolous.<sup>98</sup> A suit is frivolous if it is not serious or has no real purpose. Make a copy of your pleading for you to keep. Also, make a copy of the final agency decision you got from your exhaustion of administrative remedies, as explained above. Attach the copy of the final agency decision to your pleading. When you send your documents to court (as explained below), make sure you send the pleading and the agency decision together, and be sure you keep a copy of each.

If for some reason you need to change or add onto what you wrote in your pleading, you may do so once without permission from the court. This must be done before you get an answer from the defendant to your pleading.<sup>99</sup> Send an amended (or edited) pleading, with the same information you included in your pleading, but with any changes you had to make.

#### c. Where and How to File

You should file these documents in the Clerk's Office of the District Court where your prison is at the time the tort happened. You can use the map in the Appendix to locate the right district court. The Appendix also contains a list of the contact information for the District Court's Clerk's Offices. You can

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<sup>88</sup> LA. CIV. CODE ANN. art. 3492 (2017); *Corsey v. State*, 375 So. 2d 1319, 1322 (La. 1979).

<sup>89</sup> *Corsey v. State*, 375 So. 2d 1319, 1322 (La. 1979).

<sup>90</sup> *Harris v. Hegmann*, 198 F.3d 153, 158 (5th Cir. 1999).

<sup>91</sup> LA. CODE CIV. PROC. ANN. art. 854 (2017).

<sup>92</sup> LA. CODE CIV. PROC. ANN. art. 854 (2017).

<sup>93</sup> LA. CODE CIV. PROC. ANN. art. 854 (2017).

<sup>94</sup> LA. CODE CIV. PROC. ANN. art. 860 (2017).

<sup>95</sup> LA. CODE CIV. PROC. ANN. art. 861 (2017).

<sup>96</sup> LA. CODE CIV. PROC. ANN. art. 891 (2017).

<sup>97</sup> LA. CODE CIV. PROC. ANN. art. 863 (2017).

<sup>98</sup> LA. CODE CIV. PROC. ANN. art. 863(B) (2017).

<sup>99</sup> LA. CODE CIV. PROC. ANN. art. 1151 (2017).

look at the section above on Filing in State Court for more information on finding the right district court. You should be able to file your documents by sending them to the Clerk's Office through the prison mail system.

d. Fees

When you file your initial documents, the Clerk's Office will charge you an initial filing fee of up to \$105.00.<sup>100</sup> If you cannot pay the filing fee right away, you may be able to proceed *in forma pauperis*. *In forma pauperis* means bringing suit without prepaying fees.<sup>101</sup> If you can't pay the filing fee right away, you should also file the Application to Proceed in Forma Pauperis. You can find this application in the Appendix, labeled Form 60.7A.

This form has five pages, but you only need to fill out the first two to begin. In the middle of the first page, after it says, "NOW INTO COURT COMES," write your name in the blank that follows. Below that paragraph, write the date, sign your name, and provide your Department of Corrections ("D.O.C.") number. On the next two lines, write the name of your facility and the address of your facility. At the bottom of the first page, where it says, "I,\_\_\_\_," write in your name again. This says that you cannot afford the costs of the proceeding. On the second page, answer questions one through five about your financial situation. At the bottom of the second page, you need to write the date, sign your name, and give your D.O.C. number.

The form then requires signatures from three more people: a notary, an affiant, and an officer at your facility. First, a notary public or another person authorized to administer oaths must sign the form on page three and write their title and identification number. Second, an affiant, or someone who can testify to your inability to pay court costs, must sign their name and write the date on page three in front of the notary. Third, an authorized officer at your facility must certify the amount of credit you have in your account, listing the amounts in your Prison Drawing Account and Prison Savings Account, and how much cash and bonds you possess. They must also write the average monthly deposit and balance amounts, write the date, and sign their name. A judge or commissioner then fills out the rest of the form once you have submitted it.

If you end up needing to appeal your suit (as detailed in Section 5 below), you will have to use and file the Motion to Proceed in Forma Pauperis, which you can also find in the Appendix, labeled Form 60.7B.

This form has six pages, but you only need to fill out the first two and part of the third. In the middle of the first page, after it says, "NOW INTO COURT COMES," write your name in the blank that follows. Below that paragraph, write the date, sign your name, and write your D.O.C. number. On the next two lines, write the name of your facility and the address of your facility. At the top of the second page, where it says, "I,\_\_\_\_," write in your name. This says that you cannot afford the costs of the proceeding. On the same page, answer questions one through five about your financial situation. At the top of the third page, you need to write the date, sign your name, and give your D.O.C. number.

The form then requires signatures from three more people: a notary, an affiant, and an officer at your facility. First, a notary public or another person authorized to administer oaths must sign the form on page three and write their title and identification number. You must also sign your name and write your D.O.C. number on page three in front of the notary. Second, an affiant, or someone who can testify to your inability to pay court costs, must sign their name and write the date on page three in front of the notary. Third, an authorized officer at your facility must certify the amount of credit you have in your account, listing the amounts in your Prison Drawing Account and Prison Savings Account, and how much cash and bonds you possess. They must also write the average monthly deposit and balance amounts, write the date, and sign their name. A judge or commissioner then fills out the rest of the form once you have submitted it.

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<sup>100</sup> LA. CODE CIV. PROC. ANN. art. 5181 (2017).

<sup>101</sup> LA. REV. STAT. ANN. § 15:1186 (2017).



If you can bring the suit *in forma pauperis*, the court will decide an initial, partial filing fee and charge you that amount.<sup>102</sup> The court will collect the rest of the filing fee when you have enough funds in your account.<sup>103</sup> If the court does not let you to proceed *in forma pauperis*, you must pay the filing fee before the suit begins.<sup>104</sup> If you do not, your lawsuit will be dismissed.<sup>105</sup> If the court dismisses your suit, that means they end the suit and will not look at it.

#### 4. Procedure in State District Court

Once a Clerk's Office gets your pleading, the court will look over it.<sup>106</sup> If the court thinks that your complaint is frivolous or malicious, it may dismiss all or part of your complaint.<sup>107</sup> Frivolous means that the court thinks the suit does not have a serious purpose. Malicious means the court thinks you are trying to harm or annoy someone with your suit. If you have stated a proper claim, your complaint will be sent to the person you brought the lawsuit against.<sup>108</sup> This person is also called the *defendant*.<sup>109</sup> When the defendant replies to your pleading or the court needs to speak with you, you will get the reply or court message by mail.<sup>110</sup> The defendant will file an answer to your complaint within fifteen days from when he gets it.<sup>111</sup> In his answer, the defendant will either admit or deny what you said he did.<sup>112</sup> He will also provide any defenses he has for his actions.<sup>113</sup>

Then you will write a written request for a pre-trial conference.<sup>114</sup> When you send this in to the Clerk's Office, if you are representing yourself in your case, you should also send the Self-Represented Prisoner-Plaintiff's Portion of the Pre-Trial Order, which you can find in the Appendix, called Form 60.4.<sup>115</sup>

On this form, where it says, "Plaintiff," you need to fill in your name, your D.O.C. Number, your facility's name, and its address. Next, where it says, "Plaintiff's Claim," you should write what happened, when it happened (including the date and time), where it happened, who was involved, and who, if anyone, saw what happened. Where it says, "Contested Facts," include whatever facts the tortfeasor argues did not happen. If the tortfeasor disagrees about any legal issues (like the meaning of the law or your rights, rather than just the facts of what happened), then you should write them in the section entitled, "Contested Issues of Law." If you have any physical pieces of evidence about what happened, you should list them on the left side of the "Plaintiff's Exhibits" section. On the right side of the "Plaintiff's Exhibits" section, explain what each item will show the court. Under the "Plaintiff's Witnesses" section, on the left side, you should give the names and addresses of anyone who saw what happened (these people are called "witnesses"). On the right side, write what each witness will tell the court (this is called "testimony"). Below that section, write the date and be sure to sign your name.

Below the section called "Plaintiff's Witnesses" is a section called "Certificate of Service." You must send a copy of this form to the opposing counsel, and this section requires you to confirm that you have done so. In the first blank, write the name of the counsel representing the tortfeasor. In the second

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<sup>102</sup> LA. CODE CIV. PROC. ANN. art. 5181 (2017).

<sup>103</sup> LA. REV. STAT. ANN. § 15:1186 (2017).

<sup>104</sup> LA. REV. STAT. ANN. § 15:1186 (2017).

<sup>105</sup> LA. REV. STAT. ANN. § 15:1186 (2017).

<sup>106</sup> LA. REV. STAT. ANN. § 15:1188 (2017).

<sup>107</sup> LA. REV. STAT. ANN. § 15:1188 (2017).

<sup>108</sup> LA. REV. STAT. ANN. § 15:1188 (2017).

<sup>109</sup> LA. CODE CIV. PROC. ANN. art. 1312 (2017).

<sup>110</sup> LA. CODE CIV. PROC. ANN. art. 1313 (2017).

<sup>111</sup> LA. CODE CIV. PROC. ANN. art. 1001 (2017).

<sup>112</sup> LA. CODE CIV. PROC. ANN. art. 1003 (2017).

<sup>113</sup> LA. CODE CIV. PROC. ANN. art. 1005 (2017).

<sup>114</sup> La. Dist. Ct. R. 60.4(D) and (E) (2012), available at <http://www.lasc.org/rules/dist.ct/TitleVI.asp> (last visited Jan. 11, 2018).

<sup>115</sup> La. Dist. Ct. R. 60.4(D) and (E) (2012), available at <http://www.lasc.org/rules/dist.ct/TitleVI.asp> (last visited Jan. 11, 2018).

blank, write that counsel's address. Sign your name at the bottom of this section on the line that is above the word "Plaintiff."

After the court gets this form, it will schedule a pretrial conference. At this conference you will talk about scheduling with the judge. You will also talk about any issues that may come up before or at trial.<sup>116</sup> You do not necessarily have the right to appear in court for the pretrial conference.<sup>117</sup> The conference will probably be conducted by phone or video conference, or at your prison facility.<sup>118</sup>

Next, you will do discovery and subpoena any witnesses as necessary. Discovery means the process of finding any proof of your claim. This means proof of the act and your injury. For more information on Discovery in Louisiana, read Chapter 1: Your Right to Information. For information on Discovery in general, read Chapter 8 of the main *JLM*, "Obtaining Information to Prepare Your Case: The Process of Discovery." If you know of anyone who saw the injury or damage happen, that person is called a *witness*.<sup>119</sup> You are allowed to have up to six witnesses speak about what they saw happen.<sup>120</sup> If you ask, the clerk or the judge can issue a "subpoena," which is a document requiring that person to come to speak at your hearing or trial.<sup>121</sup>

If you brought a tort claim against the state, or an agent of the state or facility, the state or facility might want to settle the claim with you outside of court during this process or before a trial occurs. When the state offers you a settlement, it is not necessarily agreeing that it did something wrong. The state is offering to pay you a certain amount of money instead of going to trial. If the state, agent or facility offers you a settlement, you must decide whether or not to agree to the settlement. When you agree to a settlement with the state, you give up your right to ask the court for more damages. But, if you reject the settlement, go to trial, and do not think the court gave you enough damages, you may then appeal.

After discovery, the judge will hold a trial if the case needs one.<sup>122</sup> At this trial, you are the plaintiff. This means you are the person making the complaint. You, as the plaintiff, have the right to appear at your trial. The trial will probably happen like this:

- 1) You, as the plaintiff, make an opening statement. The opening statement is your brief explanation of the case and why you should win. Then the person you are suing, as the defendant, makes an opening statement.
- 2) You present your evidence. Then the defendant presents his evidence.
- 3) If you have any evidence that challenges the defendant's evidence, you can present it.
- 4) You present your argument. Then, the defendant presents his argument. Next, you can make points that challenge the defendant's argument if you need to.<sup>123</sup>

After the trial the judge will give his opinion (judgment) on your case and decide whether you win or not.<sup>124</sup> You may receive the judgment right away while at trial, or the judge may continue to think about your case and send you his judgment in the mail.<sup>125</sup> This judgment is final.<sup>126</sup> If you honestly believe there was a mistake in the judgment, you can appeal using the process detailed below.

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<sup>116</sup> LA. CODE CIV. PROC. ANN. art. 1551 (2017).

<sup>117</sup> LA. REV. STAT. ANN. § 15:1184(D) (2017) ("pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other communications technology without removing the prisoner from the facility in which he is confined.").

<sup>118</sup> LA. REV. STAT. ANN. § 15:1184(D) (2017).

<sup>119</sup> Black's Law Dictionary 1740 (9th ed., 2009).

<sup>120</sup> La. Dist. Ct. R. 60.4(E) (2012), *available at* <http://www.lasc.org/rules/dist.ct/TitleVI.asp> (last visited Jan. 11, 2018).

<sup>121</sup> LA. CODE CIV. PROC. ANN. art. 1351 (2017).

<sup>122</sup> Currently, unless your damages are worth at least \$50,000, you do not have a right to a jury trial. LA. CODE CIV. PROC. ANN. art. 1732 (2017).

<sup>123</sup> LA. CODE CIV. PROC. ANN. art. 1632 (2017).

<sup>124</sup> LA. CODE CIV. PROC. ANN. art. 862 (2017); LA. CODE CIV. PROC. ANN. art. 1841 (2017).

<sup>125</sup> LA. CODE CIV. PROC. ANN. art. 1637 (2017).

<sup>126</sup> LA. CODE CIV. PROC. ANN. art. 862 (2017); LA. CODE CIV. PROC. ANN. art. 1841 (2017).

After you receive the judgment, if you win, the judge will issue the injunction or an order directing the individual, facility, or state to pay you the amount of money owed to you. If you had been previously ordered to pay restitution to someone from a previous judgment against you, the money you are supposed to receive will go to any unpaid restitution orders first.<sup>127</sup> If there is money left over, you will get a check in the mail shortly after. If you do not receive the check after a reasonable period of time (wait several weeks), you should send a letter to the court Clerk's office, with a copy of the judgment you received and a note explaining that you did not receive the right check.

## 5. Appeal

If you did not win, or if you won but you honestly believe the relief you got is not the right amount, you can appeal the judgment. You can appeal the court's decision about the law, the facts, or both. You can also appeal if the amount awarded was too high or too low. When you make an appeal, the Court of Appeals may affirm, reverse, or change the judgment. The Court of Appeals may also dismiss the appeal, grant a new trial, or send the case back to a lower court for more proceedings.<sup>128</sup>

## D. CONCLUSION

If someone does something that causes you an injury or causes damage to your property, you may have a tort claim. You should think about several things before you bring a tort claim. First, you should figure out what kind of tort claim you want to bring and whether you can prove that you have suffered an actual injury. If you are confident that you have a real claim, be sure to use the grievance procedures in your prison first. After using those procedures, if you feel that your injury or damage has not been solved, then you may be able to bring a lawsuit in the district court. Think about the court in which you will file a claim and the kind of relief you will seek. Meet all deadlines for filing documents, make sure you file the right documents in the right places, and pay the proper fees. Finally, always keep photocopies of all of the documents you file.

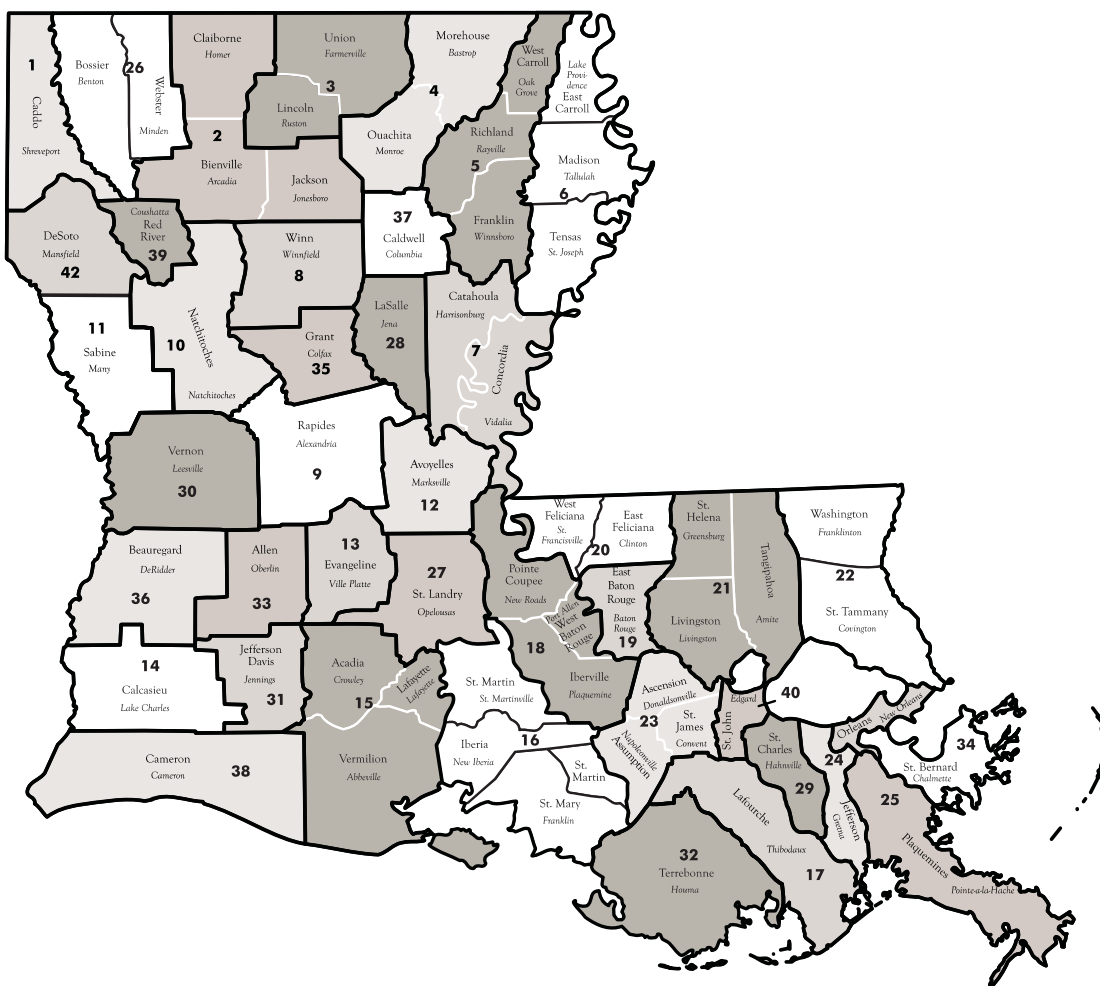
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<sup>127</sup> LA. REV. STAT. ANN. § 15:1189 (2017) ("Any damages awarded to a prisoner in connection with a civil action brought against any prison or against any official or agent of such prison shall be paid directly to satisfy any outstanding restitution orders pending against the prisoner. The remainder of any such award after full payment of all pending restitution orders shall be forwarded to the prisoner.").

<sup>128</sup> For more information on the process of an appeal, see Chapter 9 of the main *JLM*, "Appealing Your Conviction or Sentence." Though you are not appealing a criminal conviction as detailed in that Chapter, the process itself should be similar.

APPENDIX A<sup>129</sup>

## DISTRICT COURT INFORMATION AND FORMS

1. Map of Districts<sup>130</sup>

<sup>129</sup> La. Dist. Ct. R. 60 (2012), available at <http://www.lasc.org/rules/dist.ct/TitleVIAppendicesList.asp> (last visited Jan. 11, 2018).

<sup>130</sup> Louisiana District Courts Judicial Districts, available at [http://www.lasc.org/about\\_the\\_court/map01.asp](http://www.lasc.org/about_the_court/map01.asp) (last visited Jan. 11, 2018).



Marksville, La. 71351-0219  
(318) 253-7523

BEAUREGARD; 36TH JUDICIAL DISTRICT COURT

Beauregard Parish Courthouse  
201 West First St.  
DeRidder, La. 70634  
Clerk of Court  
P.O. Box 100  
DeRidder, La. 70634  
(337) 463-8595

BIENVILLE; 2ND JUDICIAL DISTRICT COURT

Bienville Parish Courthouse  
100 Courthouse Drive  
Arcadia, La. 71001  
Clerk of Court  
100 Courthouse Drive, Room 100  
Arcadia, La. 71001-3617  
(318) 263-2123

BOSSIER; 26TH JUDICIAL DISTRICT COURT

Bossier Parish Courthouse  
Burt Ave.  
Benton, La. 71006  
Clerk of Court  
P.O. Box 430  
Benton, La. 71006  
(318) 965-2336

CADDO; 1ST JUDICIAL DISTRICT COURT

Caddo Parish Courthouse  
501 Texas St.  
Shreveport, La. 71101-5408  
Clerk of Court  
501 Texas St.  
Caddo Parish Courthouse, Room 103  
Shreveport, La. 71101-5408  
(318) 226-6751

CALCASIEU; 14TH JUDICIAL DISTRICT COURT

Calcasieu Parish Judicial Center  
1001 Lakeshore Drive  
P.O. Box 3210  
Lake Charles, La. 70602  
(337) 437-3530

Calcasieu Parish Courthouse  
1000 Ryan Street  
Lake Charles, La. 70601

Clerk of Court

P.O. Box 1030  
Lake Charles, La. 70602-1030  
(337) 437-3550

CALDWELL; 37TH JUDICIAL DISTRICT COURT

Caldwell Parish Courthouse

Main Street

Columbia, La. 71418

Clerk of Court

P.O. Box 1327

Columbia, La. 71418-1327

(318) 649-2272

CAMERON; 38TH JUDICIAL DISTRICT COURT

Cameron Parish Courthouse

Courthouse Square, Smith Circle

Cameron, La. 70631

Clerk of Court

P.O. Box 549

Cameron, La. 70631

(337) 775-5316

CATAHOULA; 7TH JUDICIAL DISTRICT COURT

Catahoula Parish Courthouse

Courthouse Square

Harrisonburg, La. 71340

Clerk of Court

P.O. Box 654

Harrisonburg, La. 71340-0654

(318) 744-5497

CLAIBORNE; 2ND JUDICIAL DISTRICT COURT

Claiborne Parish Courthouse

514 N. Main St.

Homer, La. 71040

Clerk of Court

P.O. Box 330

Homer, La. 71040-0330

(318) 927-9601

CONCORDIA; 7TH JUDICIAL DISTRICT COURT

Concordia Parish Courthouse

#1 Advocate Row, Ferriday-Vidalia Highway

Vidalia, La. 71373

Clerk of Court

P.O. Box 790

Vidalia, La. 71373-0790

(318) 336-4204

DE SOTO; 42ND JUDICIAL DISTRICT COURT

DeSoto Parish Courthouse

Courthouse Square

Mansfield, La. 71052

Clerk of Court

P.O. Box 1206

Mansfield, La. 71052-1206

(318) 872-3110

EAST BATON ROUGE; 19TH JUDICIAL DISTRICT COURT

East Baton Rouge Courthouse

300 North Boulevard  
Baton Rouge, La. 70801  
Clerk of Court  
P.O. Box 1991  
Baton Rouge, La. 70821  
(225) 389-3960

EAST CARROLL; 6TH JUDICIAL DISTRICT COURT

East Carroll Parish Courthouse  
400 1st Street  
Lake Providence, La. 71254  
Clerk of Court  
400 1st Street, Suite 3  
Lake Providence, La. 71254-2695  
(318) 559-2399

EAST FELICIANA; 20TH JUDICIAL DISTRICT COURT

East Feliciana Parish Courthouse  
St. Helena St., Courthouse Square  
Clinton, La. 70722  
Clerk of Court  
P.O. Drawer 599  
Clinton, La. 70722-0599  
(225) 683-5145

EVANGELINE; 13TH JUDICIAL DISTRICT COURT

Evangeline Parish Courthouse  
200 Court Street, Suite 200  
Ville Platte, La. 70586  
Clerk of Court  
P.O. Drawer 347  
Ville Platte, La. 70586-0347  
(337) 363-5671

FRANKLIN; 5TH JUDICIAL DISTRICT COURT

Franklin Parish Courthouse  
208 Main Street  
Winnsboro, La. 71295  
Clerk of Court  
P.O. Box 1564  
Winnsboro, La. 71295-1564  
(318) 435-5133

GRANT; 35TH JUDICIAL DISTRICT COURT

Grant Parish Courthouse  
200 Main Street  
Colfax, La. 71417  
Clerk of Court  
P.O. Box 263  
Colfax, La. 71417-0263  
(318) 627-3246

IBERIA; 16TH JUDICIAL DISTRICT COURT

Iberia Parish Courthouse  
300 Iberia Street  
New Iberia, La. 70560



Clerk of Court

P.O. Box 12010

New Iberia, La. 70562-2010

(337) 365-7282

IBERVILLE; 18TH JUDICIAL DISTRICT COURT

Iberville Parish Courthouse

600 Meriam

Plaquemine, La. 70764

Clerk of Court

P.O. Box 423

Plaquemine, La. 70764

(225) 687-5160

JACKSON; 2ND JUDICIAL DISTRICT COURT

Jackson Parish Courthouse

500 East Court

Jonesboro, La. 71251

Clerk of Court

P.O. Drawer 730

Jonesboro, La. 71251

(318) 259-2424

JEFFERSON; 24TH JUDICIAL DISTRICT COURT

Jefferson Parish Courthouse

Second &amp; Derbigny Streets

Gretna, La. 70053

Clerk of Court

P.O. Box 10

Gretna, La. 70054-0010

(504) 364-2900

JEFFERSON DAVIS; 31ST JUDICIAL DISTRICT COURT

Jefferson Davis Parish Courthouse

300 State Street

Jennings, La. 70546

Clerk of Court

P.O. Box 700

Jennings, La. 70546-0799

(337) 824-1160

LAFAYETTE; 15TH JUDICIAL DISTRICT COURT

Lafayette Parish Courthouse

800 South Buchanan St.

Lafayette, La. 70501

Clerk of Court

P.O. Box 2009

Lafayette, La. 70502-2009

(337) 291-6400

LAFOURCHE; 17TH JUDICIAL DISTRICT COURT

Lafourche Parish Courthouse

303 W. Third Street

Thibodaux, La. 70301

Clerk of Court

P.O. Box 818

Thibodaux, La. 70302-0818  
(985) 447-4841

LASALLE; 28TH JUDICIAL DISTRICT COURT

LaSalle Parish Courthouse  
Courthouse St.  
Jena, La. 71342  
Clerk of Court  
P.O. Box 1316  
Jena, La. 71342-1316  
(318) 992-2158

LINCOLN; 3RD JUDICIAL DISTRICT COURT

Lincoln Parish Courthouse  
100 Texas St.  
Ruston, La. 71270  
Clerk of Court  
P.O. Box 924  
Ruston, La. 71273-0924  
(318) 251-5130

LIVINGSTON; 21ST JUDICIAL DISTRICT COURT

Livingston Parish Courthouse  
Corner of Iowa and Magnolia Streets  
Livingston, La. 70754  
Clerk of Court  
P.O. Box 1150  
Livingston, La. 70754-1150  
(225) 686-2216

MADISON; 6TH JUDICIAL DISTRICT COURT

Madison Parish Courthouse  
100 North Cedar St.  
Tallulah, La. 71282  
Clerk of Court  
P.O. Box 1710  
Tallulah, La. 71282  
(318) 574-0655

MOREHOUSE; 4TH JUDICIAL DISTRICT COURT

Morehouse Parish Courthouse  
100 East Madison  
Bastrop, La. 71220  
Clerk of Court  
P.O. Box 1543  
Bastrop, La. 71221-1543  
(318) 281-3343

NATCHITOCHES; 10TH JUDICIAL DISTRICT COURT

Natchitoches Parish Courthouse  
New Courthouse Building – Church Street  
Natchitoches, La. 71457  
Clerk of Court  
P.O. Box 476  
Natchitoches, La. 71458-0476  
(318) 352-8152

ORLEANS; ORLEANS CIVIL DISTRICT COURT

Orleans Parish Courthouse  
Civil Courts Building  
421 Loyola Ave., Room 402  
New Orleans, La. 70112-1198  
Civil District Court Clerk  
Civil Courts Building  
421 Loyola Ave., Room 402  
New Orleans, La. 70112-1104  
(504) 407-0000

ORLEANS; ORLEANS CRIMINAL DISTRICT COURT

Orleans Parish Courthouse  
Criminal Courts Building  
2700 Tulane Ave.  
New Orleans, La. 70119  
Judicial Administrator's Office: (504) 658-9100; Fax: (504) 658-9113  
Clerk of Court: (504) 658-9000; Fax: (504) 658-9183

OUACHITA; 4TH JUDICIAL DISTRICT COURT

Ouachita Parish Courthouse  
300 St. John St.  
Monroe, La. 71201  
Clerk of Court  
P.O. Box 1862  
Monroe, La. 71210-1862  
(318) 327-1444

PLAQUEMINES; 25TH JUDICIAL DISTRICT COURT

Plaquemines Parish Courthouse  
301 Main St.  
Belle Chasse, La. 70037  
Clerk of Court  
P.O. Box 40  
Belle Chasse, La. 70037  
(504) 297-5180

POINTE COUPEE; 18TH JUDICIAL DISTRICT COURT

Pointe Coupee Parish Courthouse  
Main Street  
New Roads, La. 70760  
Clerk of Court  
P.O. Box 86  
New Roads, La. 70760-0086  
(225) 638-9596

RAPIDES; 9TH JUDICIAL DISTRICT COURT

Rapides Parish Courthouse  
700 Murray St.  
Alexandria, La. 71301  
Clerk of Court  
P.O. Box 952  
Alexandria, La. 71309-0952  
(318) 473-8153

RED RIVER; 39TH JUDICIAL DISTRICT COURT

Red River Parish Courthouse

615 Carroll St.

Coushatta, La. 71019

Clerk of Court

P.O. Box 485

Coushatta, La. 71019

(318) 932-6741

RICHLAND; 5TH JUDICIAL DISTRICT COURT

Richland Parish Courthouse

Courthouse Square, 100 Julia Street

Rayville, La. 71269

Clerk of Court

P.O. Box 119

Rayville, La. 71269-0119

(318) 728-4171

SABINE; 11TH JUDICIAL DISTRICT COURT

Sabine Parish Courthouse

Corner of Capital & Main Streets

Many, La. 71440

Clerk of Court

P.O. Box 419

Many, La. 71449-0419

(318) 256-6223

ST. BERNARD; 34TH JUDICIAL DISTRICT COURT

St. Bernard Parish Courthouse

1100 West St. Bernard Hwy.

Chalmette, La. 70043

Clerk of Court

P.O. Box 1746

Chalmette, La. 70044

(504) 271-3434

ST. CHARLES; 29TH JUDICIAL DISTRICT COURT

St. Charles Parish Courthouse

Courthouse Building

River Road

Hahnville, La. 70057

Clerk of Court

P.O. Box 424

Hahnville, La. 70057-0424

(985) 783-6632

ST. HELENA; 21ST JUDICIAL DISTRICT COURT

St. Helena Parish Courthouse

Courthouse Square

Greensburg, La. 70441

Clerk of Court

P.O. Box 308

Greensburg, La. 70441-0308

(225) 222-4514

ST. JAMES; 23RD JUDICIAL DISTRICT COURT

St. James Parish Courthouse  
5800 LA 44  
P.O. Box 63  
Convent, La. 70723  
(225) 562-2270

ST. JOHN THE BAPTIST; 40TH JUDICIAL DISTRICT COURT

St. John the Baptist Parish Courthouse  
Corner of East Third Street & River Road  
Edgard, La. 70049  
Clerk of Court  
P.O. Box 280  
Edgard, La. 70049-0280  
(985) 497-3331

ST. LANDRY; 27TH JUDICIAL DISTRICT COURT

St. Landry Parish Courthouse  
Court & Landry Streets  
Opelousas, La. 70571  
Clerk of Court  
P.O. Box 750  
Opelousas, La. 70571-0750  
(337) 942-5606

ST. MARTIN; 16TH JUDICIAL DISTRICT COURT

St. Martin Parish Courthouse  
Courthouse Square  
Main Street  
St. Martinville, La. 70582  
Clerk of Court  
P.O. Box 308  
St. Martinville, La. 70582  
(337) 394-2210

ST. MARY; 16TH JUDICIAL DISTRICT COURT

St. Mary Parish Courthouse  
500 Main Street  
Franklin, La. 70538  
Clerk of Court  
P.O. Drawer 1231  
Franklin, La. 70538-1231  
(337) 828-4100

ST. TAMMANY; 22ND JUDICIAL DISTRICT COURT

St. Tammany Parish Justice Center  
701 N. Columbia St.  
Covington, La. 70433  
Clerk of Court  
P.O. Box 1090  
Covington, La. 70434-1090  
(985) 809-8700

TANGIPAHOA; 21ST JUDICIAL DISTRICT COURT

Tangipahoa Parish Courthouse  
Corner of Bay & Mulberry Streets

Amite, La. 70422  
Clerk of Court  
P.O. Box 667  
Amite, La. 70422-0667  
(985) 748-4146

TENSAS: 6TH JUDICIAL DISTRICT COURT

Tensas Parish Courthouse  
Courthouse Square  
St. Joseph, La. 71366  
Clerk of Court  
P.O. Box 78  
St. Joseph, La. 71366  
(318) 766-3921

TERREBONNE: 32ND JUDICIAL DISTRICT COURT

Terrebonne Parish Courthouse  
400 Main St.  
Houma, La. 70360  
Clerk of Court  
P.O. Box 1569  
Houma, La. 70361  
(985) 868-5660

UNION: 3RD JUDICIAL DISTRICT COURT

Union Parish Courthouse  
100 East Bayou St.  
Farmerville, La. 71241  
Clerk of Court  
100 East Bayou St., Suite 105  
Farmerville, La. 71241-2894  
(318) 368-3055

VERMILION: 15TH JUDICIAL DISTRICT COURT

Vermilion Parish Courthouse  
100 North State St.  
Abbeville, La. 70510  
Clerk of Court  
100 North State St., Suite 101  
Abbeville, La. 70510  
(337) 898-1992

VERNON: 39TH JUDICIAL DISTRICT COURT

Vernon Parish Courthouse  
201 South Third St.  
Leesville, La. 71446  
Clerk of Court  
P.O. Box 40  
Leesville, La. 71496-0040  
(337) 238-1384

WASHINGTON: 22ND JUDICIAL DISTRICT COURT

Washington Parish Courthouse  
Courthouse Building  
Corner of Washington & Main Streets  
Franklinton, La. 70438

Clerk of Court

P.O. Box 607  
Franklinton, La. 70438  
(985) 839-4663

WEBSTER; 26TH JUDICIAL DISTRICT COURT

Webster Parish Courthouse  
410 Main St.  
Minden, La. 71055  
Clerk of Court  
P.O. Box 370  
Minden, La. 71058-0370  
(318) 371-0366

WEST BATON ROUGE; 18TH JUDICIAL DISTRICT COURT

West Baton Rouge Parish Courthouse  
850 Eighth St.  
Port Allen, La. 70767  
Clerk of Court  
P.O. Box 107  
Port Allen, La. 70767-0107  
(225) 383-0378

WEST CARROLL; 5TH JUDICIAL DISTRICT COURT

West Carroll Parish Courthouse  
Courthouse Square  
Oak Grove, La. 71263  
Clerk of Court  
P.O. Box 1078  
Oak Grove, La. 71263  
(318) 428-3281

WEST FELICIANA; 20TH JUDICIAL DISTRICT COURT

West Feliciana Parish Courthouse  
Corner of Prosperity & Ferdinand Streets  
St. Francisville, La. 70775  
Clerk of Court  
P.O. Box 1843  
St. Francisville, La. 70775-1843  
(225) 635-3794

WINN; 8TH JUDICIAL DISTRICT COURT

Winn Parish Courthouse  
119 West Main St.  
Winnfield, La. 71483  
Clerk of Court  
Winn Parish Courthouse  
119 West Main St., Room 103  
Winnfield, La. 71483  
(318) 628-3515

3. Form 60.4 – Pro Se Prisoner-Plaintiff's Portion of the Pre-Trial Order<sup>132</sup>**Appendix 60.4. (Rule 60.4) Pro Se Prisoner-Plaintiff's Portion of the Pre-Trial Order**

NUMBER:                      DIVISION:  
 JUDICIAL DISTRICT COURT  
 VS. \_\_\_\_\_  
 PARISH OF EAST BATON ROUGE  
 STATE OF LOUISIANA

**PRO SE PRISONER SUIT-- PRETRIAL ORDER FOR PLAINTIFF****Plaintiff:** \_\_\_\_\_

(Your name and Address)

**Plaintiff's Claim:** State facts in support:

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**CONTESTED FACTS:** (List those facts in dispute.)

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**CONTESTED ISSUES OF LAW:** (List those legal issues in dispute.)

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**PLAINTIFF'S EXHIBITS:** (On the left side, state the name of, or describe each item you intend to introduce as evidence at trial. On the right side, state what you expect it to prove).**Exhibit (item)****What It Will Prove**

1. \_\_\_\_\_

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<sup>132</sup> La. Dist. Ct. R. 60.4, App. 60.4 (2012), *available at*  
<http://www.lasc.org/rules/dist.ct/COURTRULESAPPENDIX60.4.pdf> (last visited Jan. 11, 2018).



|          |       |
|----------|-------|
| 2. _____ | _____ |
| 3. _____ | _____ |
| 4. _____ | _____ |

**PLAINTIFF'S WITNESSES** (On the left side, state the name and address of each witness you anticipate presenting at trial. On the right side, state the subject of the witness' testimony-- what he/she will talk about. If more space is needed, attach another sheet of paper.)

| <b>Witness</b>                          | <b>Subject of Testimony</b> |
|---|-----------------------------|
| 1. Name _____<br>Address _____<br>_____ | _____<br>_____<br>_____     |
| 2. Name _____<br>Address _____<br>_____ | _____<br>_____<br>_____     |
| 3. Name _____<br>Address _____<br>_____ | _____<br>_____<br>_____     |
| 4. Name _____<br>Address _____<br>_____ | _____<br>_____<br>_____     |
| 5. Name _____<br>Address _____<br>_____ | _____<br>_____<br>_____     |
| 1. Name _____<br>Address _____<br>_____ | _____<br>_____<br>_____     |

\_\_\_\_\_  
DATE

\_\_\_\_\_  
PLAINTIFF'S SIGNATURE

**Certificate of Service**

I hereby certify that I have today provided opposing counsel, \_\_\_\_\_, with a copy of this pretrial order by mailing a copy hereof to him/her at the following address: \_\_\_\_\_.

Failure to show that I mailed a copy of this Order to opposing counsel may result in delay of my request for a pretrial conference.

\_\_\_\_\_  
Plaintiff

<http://www.lasc.org/rules/dist.ct/COURTRULESAPPENDIX60.4.PDF>

4. Form 60.7A – Application to Proceed *In Forma Pauperis* (District Court)<sup>133</sup>**Appendix 60.7A. (Rule 60.7) Application To Proceed In Forma Pauperis Filed in District Court****In Forma Pauperis Application  
Civil Litigation Filed by Offender/  
Prisoner**

NUMBER:                      SECTION/DIVISION:  
  
\_\_\_\_ JUDICIAL                      DISTRICT COURT  
VERSUS  
PARISH                      OF \_\_\_\_\_  
  
STATE OF LOUISIANA

**OFFENDER/PRISONER PAUPER MOTION AND ORDER FOR DISTRICT COURT**

NOW INTO COURT COMES \_\_\_\_\_, Petitioner in the above-styled cause and, pursuant to the provisions of C.C.P. art. 5181 et seq., respectfully moves for leave to proceed in forma pauperis without prepayment of fees, costs or security given therefor. In accordance with LSA-R.S. 15:1186 et seq., the Petitioner shall be required, when funds exist, to pay an initial partial filing fee of 20% of the average monthly deposits and thereafter prison officials shall be required to forward to the Clerk of court monthly payments of 20% of the preceding month's income credited to the Petitioner's inmate account until the entire filing fee is paid. Petitioner hereby authorizes the Department of Corrections to withdraw and forward to the Clerk of Court the initial and subsequent monthly payments from his/her inmate banking account as ordered by the Court.

Date: \_\_\_\_\_  
Signature and D.O.C. Number

\_\_\_\_\_  
Name of Facility Where Currently Housed

\_\_\_\_\_  
Address of Facility

**AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS**

I, \_\_\_\_\_, declare that I am the Petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security

<sup>133</sup> La. Dist. Ct. R. 60.7, App. 60.7(A) (2012), available at <http://www.lasc.org/rules/dist.ct/COURTRULESAPPENDIX60.7A.pdf> (last visited Jan. 11, 2018).

therefor, I state that because of my poverty that I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further declare that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes ( ) No ( )

a. If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer.

b. If the answer is no, state the date of last employment and the amount of the salary and wages per month which you have received.

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession, or form of self employment (hobby craft sales included)? Yes ( ) No ( )

b. Rent payments, interest or dividends? Yes ( ) No ( )

c. Pensions, annuities, or life insurance payments? Yes ( ) No ( )

d. Gifts or inheritances? Yes ( ) No ( )

e. Any other sources? Yes ( ) No ( )

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past 12 months.

3. Do you own any cash, or do you have money and/or bonds in a checking or savings account? (Include any funds in prison accounts) Yes ( ) No ( ). If the answer is yes, state the total value of items owned.

Prison Drawing Account: \$

Prison Savings Account: \$

a. Cash: \$

b. Bonds: \$

c. Other(s) (specify): \_\_\_\_\_

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishing and clothing)? Yes ( ) No ( )

If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, indicate how much you contribute toward their support.

I declare under penalty of perjury that the foregoing is true and correct.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury and/or dismissal of my suit. I authorize the Department of Corrections to make payments from my account(s) in accordance with law.

Date: \_\_\_\_\_

\_\_\_\_\_  
Signature of Petitioner and D.O.C. Number

**STATE OF LOUISIANA****PARISH OF** \_\_\_\_\_

\_\_\_\_\_, being first duly sworn and under oath presents that he has read, signed, and subscribed to the above and states that the information therein is true and correct.

\_\_\_\_\_  
**Petitioner's Signature****Pe**\_\_\_\_\_  
**itioner's D.O.C. Number**

Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
**Notary Public or other person authorized to administer oaths**\_\_\_\_\_  
**Title and Identification Number****STATE OF LOUISIANA****PARISH OF** \_\_\_\_\_

\_\_\_\_\_, being first duly sworn and under oath, did depose and say that he/she is not an attorney or petitioner; that he/she knows Petitioner and knows his/her financial condition, and believes that he/she is unable to pay the costs of court in advance, or as they accrue, or to furnish security therefor.

\_\_\_\_\_  
**Signature of Affiant**

Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
**Notary Public or other person authorized to administer oaths**\_\_\_\_\_  
**Title and Identification Number**

**STATEMENT OF ACCOUNT**  
**(Certified Institutional Equivalent)**

I hereby certify that \_\_\_\_\_, inmate number \_\_\_\_\_, the Petitioner herein, has the following sums of money on account to his/her credit at \_\_\_\_\_, institution where he/she is confined:

Prison Drawing Account: \$

Prison Savings Account: \$

A. Cash: \$

B. Bonds: \$

I further certify that the average monthly deposits for the preceding six months is \$\_\_\_\_\_.  
(The average monthly deposits are to be determined by adding the deposits made during a given month and dividing that total by the number of deposits made during that month. This is repeated for each of the six months. The average from each of the six months are to be added together and the total is to be divided by six.)

I further certify that the average monthly balance for the prior six months is \$\_\_\_\_\_.  
(The average monthly balance is to be determined by adding each day's balance for a given month and dividing that total by the number of days in that month. This is to be repeated for each of the six months. The balance from each of the six months are to be added together and the total is to be divided by six.)

Date Certified: \_\_\_\_\_

\_\_\_\_\_  
**Signature of Authorized Officer of Institution and  
Title of Institution**

NUMBER: SECTION/DIVISION:

JUDICIAL DISTRICT COURT

\_\_\_\_\_  
VERSUS

PARISH OF \_\_\_\_\_

STATE OF LOUISIANA

### **DISTRICT COURT PAUPER ORDER**

Considering the Petitioner's application to proceed in forma pauperis; that the said application reflects the status of his/her eligibility as of the date of the signing of the form, the law and evidence being in favor thereof:

**IT IS ORDERED** , that Petitioner's motion to proceed in forma pauperis is granted pursuant to law, for the purpose of the filing fee. All petitioners granted in forma pauperis status shall be assessed and required to pay \$\_\_\_\_\_, the full filing fee, in amounts as set by LSA-R.S. 15:1186, et seq., plus all costs accruing after the filing of the suit. Petitioner shall be required to

pay an initial partial filing fee and thereafter, without further action by the Petitioner, prison officials shall be required to forward monthly payments from the Petitioner's inmate account until the entire filing fee is paid.

**IT IS FURTHER ORDERED** , that within 20 days from the date of this order the Petitioner shall pay an initial partial filing fee in the amount of \$\_\_\_\_\_ to the Clerk of Court for the \_\_\_\_ Judicial District Court, or the suit may be dismissed or stayed. It is the Petitioner's responsibility to pay the initial partial filing fee.

**IT IS FURTHER ORDERED** that following the initial payment, the Petitioner shall make monthly payments of 20 per cent of the preceding month's income credited to his/her prison account until costs due are paid. The Louisiana Department of Public Safety and Corrections Centralized Inmate Banking Section shall automatically forward monthly payments to the court for the payment of the filing costs due, without further action by the Petitioner.

**IT IS FURTHER ORDERED** that following payment of the initial partial filing fee, Centralized Inmate Banking Section for the Louisiana Department of Public Safety and Corrections shall forward the monthly payment from the Petitioner's prison account to the Clerk of Court each time the amount in Petitioner's prison account exceeds \$10 until the initial advance deposit of \$\_\_\_\_\_ and all costs accruing after filing are paid.

**IT IS FURTHER ORDERED** that a copy of this order shall be mailed to the Petitioner and to Centralized Inmate Banking Section of the Louisiana Department of Public Safety and Corrections.

**IT IS FURTHER ORDERED** , that the Louisiana Department of Public Safety and Corrections remit the above ordered funds to the \_\_\_\_ Judicial District Court, as herein ordered, at the following address: Collections Department, P.O. Box \_\_\_\_\_, LA \_\_\_\_\_ in accordance with law until all costs are paid.

**SO ORDERED**, this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, at \_\_\_\_\_, Louisiana.

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**JUDGE/COMMISSIONER**  
\_\_\_\_\_  
**JUDICIAL DISTRICT COURT**

<http://www.lasc.org/rules/dist.ct/COURTRULESAPPENDIX60.7A.PDF>

5. Form 60.7B – Motion to Proceed *In Forma Pauperis* (Court of Appeals)<sup>134</sup>**Appendix 60.7B. (Rule 60.7) Motion To Proceed In Forma Pauperis on Appeals/Writs**

NUMBER: \_\_\_\_\_ SECTION/DIVISION: \_\_\_\_\_  
 \_\_\_\_\_ JUDICIAL DISTRICT COURT  
 VERSUS  
 PARISH OF \_\_\_\_\_  
 STATE OF LOUISIANA

**APPELLATE PAUPER MOTION**

**NOW INTO COURT COMES** \_\_\_\_\_, Appellant in the above-styled cause and pursuant to the provisions of C.C.P. art. 5181 et seq., respectfully moves to proceed in forma pauperis without prepayment of fees, costs, or security given therefor. In accordance with LSA-R.S. 15:1186 et seq., the Appellant shall be required, when funds exist, to pay an initial partial filing fee of \$\_\_\_\_\_ or 20% of the average monthly deposits up to a maximum of \$\_\_\_\_\_, and thereafter prison officials shall be required to forward monthly payments of 20% of the preceding month's income credited to the Appellant's inmate account until the entire filing fee and record preparation fees are paid. Appellant hereby authorizes the Department of Corrections to withhold and forward to the Clerk of Court the initial and subsequent monthly payments.

**Date:** \_\_\_\_\_

\_\_\_\_\_  
**Signature of Appellant and D.O.C. Number**

\_\_\_\_\_  
**Name of Facility Where Currently Housed**

\_\_\_\_\_  
**Address of Facility**

<sup>134</sup> La. Dist. Ct. R. 60.7, App. 60.7(B) (2012), *available at* <http://www.lasc.org/rules/dist.ct/COURTRULESAPPENDIX60.7B.pdf> (last visited Jan. 11, 2018).

**AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS**

I, \_\_\_\_\_, declare that I am the Appellant in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty that I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further declare that the responses that I have made to questions and instructions below are true.

1. Are you presently employed? Yes ( ) No ( )

a. If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer.

b. If the answer is no, state the date of last employment and the amount of the salary and wages per month which you have received.

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession, or form of self employment (hobby craft sales included)? Yes ( ) No ( )

b. Rent payments, interest or dividends? Yes ( ) No ( )

c. Pensions, annuities or life insurance payments? Yes ( ) No ( )

d. Gifts or inheritances? Yes ( ) No ( )

e. Any other sources? Yes ( ) No ( )

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past 12 months.

3. Do you own any cash, or do you have money and/or bonds in a checking or savings account? (Include any funds in prison accounts.) Yes ( ) No ( ). If the answer is yes, state the total value of items owned.

Prison Drawing Account: \$

Prison Savings Account: \$

a. Cash: \$

b. Bonds: \$

c. Other(s) (specify): \_\_\_\_\_

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishing and clothing)? Yes ( ) No ( )

If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, indicate how much you contribute toward their support.

I declare under penalty of perjury that the foregoing is true and correct.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury and/or dismissal of my suit. I authorize the Department of Corrections to make payments from my account(s) in accordance with law.



Date: \_\_\_\_\_

\_\_\_\_\_  
Signature of Appellant and D.O.C. Number

STATE OF LOUISIANA

PARISH OF \_\_\_\_\_

\_\_\_\_\_, being first duly sworn and under oath presents that he/she has read, signed, and subscribed to the above and states that the information therein is true and correct.

\_\_\_\_\_  
Appellant's Signature

\_\_\_\_\_  
Appellant's D.O.C. Number

Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public or other person authorized to administer oaths

\_\_\_\_\_  
Title and Identification Number

### THIRD PARTY AFFIDAVIT

STATE OF LOUISIANA

PARISH OF \_\_\_\_\_

\_\_\_\_\_, being first duly sworn and under oath, did depose and say that he/she is not attorney or Appellant; that he/she knows Appellant and knows his/her financial condition, and believes that he/she is unable to pay the costs of court in advance, or as they accrue, or to furnish security therefor.

\_\_\_\_\_  
Signature of Affiant

Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public or other person authorized to administer oaths

\_\_\_\_\_  
Title and Identification Number

**STATEMENT OF ACCOUNT**  
**(Certified Institutional Equivalent)**

I hereby certify that \_\_\_\_\_, D.O.C. number \_\_\_\_\_, the Appellant herein, has the following sums of money on account to his/her credit at \_\_\_\_\_, institution where he/she is confined:

Prison Drawing Account: \$

Prison Savings Account: \$

A. Cash: \$

B. Bonds: \$

I further certify that the average monthly deposits for the preceding six months is \$\_\_\_\_\_.  
(The average monthly deposits are to be determined by adding the deposits made during a given month and dividing that total by the number of deposits made during that month. This is repeated for each of the six months. The average from each of the six months are to be added together and the total is to be divided by six.)

I further certify that the average monthly balance for the prior six months is \$\_\_\_\_\_.  
(The average monthly balance is to be determined by adding each day's balance for a given month and dividing that total by the number of days in that month. This is to be repeated for each of the six months. The balances from each of the six months are to be added together and the total is to be divided by six.)

**Date Certified:** \_\_\_\_\_

\_\_\_\_\_  
**Signature of Authorized Officer of Institution and  
Title of Institution**

NUMBER: \_\_\_\_\_

SECTION/DIVISION: \_\_\_\_\_

VERSUS

\_\_\_\_ JUDICIAL DISTRICT COURT

PARISH OF \_\_\_\_\_

STATE OF LOUISIANA

**APPELLATE PAUPER ORDER**

Considering the Appellant's application to proceed in forma pauperis; that the said application reflects the status of his/her eligibility as of the date of the signing of the form, the law and evidence being in favor thereof:

**IT IS ORDERED** that Appellant's motion to proceed in forma pauperis is granted pursuant to law, for the purpose of the filing and record preparation fee. All Appellants granted in forma pauperis status shall be assessed and required to pay \$\_\_\_\_, the initial filing fee and record preparation fee in amounts as set by LSA-R.S. 15:1186, et seq. Appellant shall be required to pay an initial partial filing fee and thereafter, prison officials shall be required to forward monthly payments from the Appellant's inmate account until the entire filing fee is paid.

**IT IS FURTHER ORDERED** that within 20 days from the date of this order or full payment of the trial court costs and preparation fee, whichever is sooner, the Appellant shall pay an initial partial filing fee in the amount of \$\_\_\_\_ to the Clerk of Court for the \_\_\_\_ Judicial District Court, or the appeal may be dismissed by the Court of Appeal. It is the Appellant's responsibility to pay the initial partial filing fee of the Court of Appeal and the court preparation fee through the \_\_\_\_\_ Parish Clerk of Court's office for the \_\_\_\_ Judicial District.

**IT IS FURTHER ORDERED** that the Appellant shall make monthly payments of 20% of the preceding month's income credited to his/her prison account. Monthly payments shall be automatically forwarded to the Centralized Inmate Banking Section for the Louisiana Department of Public Safety and Corrections without further action by the Appellant.

**IT IS FURTHER ORDERED** that following payment of the initial partial filing fee, Centralized Inmate Banking Section for the Louisiana Department of Public Safety and Corrections shall forward the monthly payment from the Appellant's prison account to the Clerk of Court each time the amount in Appellant's prison account exceeds \$10 until the appellant filing fee of \$\_\_\_\_ and all record preparation fees are paid.

**IT IS FURTHER ORDERED** that a copy of this order shall be mailed to the Appellant and to Centralized Inmate Banking Section of the Louisiana Department of Public Safety and Corrections.

**IT IS FURTHER ORDERED**, that the Louisiana Department of Public Safety and Corrections remit the above-ordered funds to the \_\_\_\_ Judicial District Court, Collections

Department, \_\_\_\_\_, LA \_\_\_\_\_ in accordance with law until all appellate costs are paid.

**SO ORDERED**, this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, in \_\_\_\_\_, Louisiana.

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**JUDGE/COMMISSIONER**  
\_\_\_\_ **JUDICIAL DISTRICT COURT**

# CHAPTER 11: PRISON DISCIPLINARY HEARINGS\*

## A. INTRODUCTION

This Chapter outlines the rights and responsibilities of prisoners facing disciplinary action for violating prison rules and regulations in the State of Louisiana. Please refer to Chapter 18 of the main *JLM*, “Your Rights at Prison Disciplinary Hearings,” to review your rights and responsibilities under federal law, in addition to general constitutional guarantees which apply to all disciplinary proceedings. Chapter 18 of the main *JLM* describes each of these rights in detail—including the fundamental right to “due process”—and explains how they govern prison disciplinary proceedings in general (*see* Part D of Chapter 18 of the main *JLM* specifically). Note that these federal and constitutional rights serve to limit the discretion (freedom) of states, and are responsible for a number of protective procedures required by state law.

Prison officials enjoy broad authority to discipline prisoners with sanctions (punishments) ranging from simple reprimands to long-term disciplinary detention. Prison officials can subject prisoners to disciplinary-like conditions—such as administrative segregation from the general population—when a prisoner has not broken any laws or rules.<sup>1</sup> Or prison officials may take actions that otherwise appear disciplinary in nature—such as changing a prisoner’s custody status, job classification, or housing assignment—if they believe it is necessary for either public policy reasons or to ensure the safety of the prison institution.<sup>2</sup> More typically, however, prison officials impose sanctions on prisoners found guilty of violating specific prison rules or procedures. This Chapter only concerns itself with the disciplinary process as it relates to these types of offenses. Specifically, this Chapter discusses the disciplinary process related to violations of Schedule A or B offenses as defined in Louisiana’s *Disciplinary Rules and Procedures for Adult Offenders*,<sup>3</sup> also referred to as the *Offender Rulebook*.<sup>4</sup>

Part B of this Chapter reviews the disciplinary system in general, and discusses the two types of offenses with which you may be charged (Schedule A and Schedule B offenses), the two-tiered disciplinary system of courts (consisting of both a Low Court Hearing and a High Court Hearing), and your right to a timely (prompt) hearing. Part C describes what to expect on the day of your hearing, and lists all the important procedures you must follow in order to preserve (keep) all of your rights moving forward. Part D focuses less on what you *must* do and more on what you *can* do, and lists all the rights you can exercise prior to and during your hearing. Part E details the list of potential sanctions you face if found guilty. Finally, Part F addresses the number of ways you can challenge the administrative decisions of a disciplinary court, including the right to appeal to a High Court, a Warden, or the Prison Secretary, or to file a claim in State or Federal Court.

## B. THE STRUCTURE OF THE PRISON DISCIPLINARY SYSTEM

All prisoners sentenced to the custody of the Department of Public Safety and Corrections in Louisiana are provided a copy of the *Disciplinary Rules and Procedures for Adult Offenders*, or more simply,

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\* This Chapter was written by David James McDonnell Bright. Special thanks to Professor Brett Dignam at Columbia Law School for her valuable comments.

<sup>1</sup> LA. ADMIN. CODE tit. 22, § 341F(1)(a)(i)(c) (2017) (permitting a prisoner to be confined to administrative segregation if (1) he “poses a threat to life, property, self, staff or other offenders, or to the security or orderly operation of the institution,” or (2) the prisoner “is the subject of an investigation”).

<sup>2</sup> LA. ADMIN. CODE tit. 22, § 341D(5) (2017) (permitting prison officials to do a number of actions which are not considered “penalties” per se—such as changing a prisoner’s “custody status, job classification, housing assignment, institutional assignment, and/or ability to participate in institutional programs or activities”—so long as the prison official claims these actions are taken to promote institutional security or further other “legitimate institutional goals”).

<sup>3</sup> La. Dep’t. of Pub. Safety & Corr., *Disciplinary Rules and Procedures for Adult Offenders 20–29* (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Mar. 23, 2014).

<sup>4</sup> LA. ADMIN. CODE tit. 22, § 341D (2017) (noting the Louisiana Department of Public Safety and Corrections provides a copy of the *Disciplinary Rules and Procedures for Adult Offenders*—also known as the *Offender Rulebook*—in order to provide “clear and proper notice” to all prisoners of the prison rules, procedures, and appeal mechanisms, including all the associated rights of the prisoner).

the *Offender Rulebook*. After receiving the *Offender Rulebook*, you must get a signed receipt which serves as proof you received “notice” (was made aware) of all the prison rules and regulations that you must follow.<sup>5</sup> The main purpose of the *Offender Rulebook* is to inform you of the type of conduct which may lead to disciplinary measures. If you did not receive a copy of the *Offender Rulebook*, you should request a copy from any prison official. The content of the *Offender Rulebook* is also available online.<sup>6</sup>

Section 1 in Part B discusses the offenses listed in the *Offender Rulebook* and groups them into Schedule A offenses (lesser offenses) and Schedule B offenses (more serious offenses). Section 2 discusses the types of hearings you will be provided based upon the type of offense you committed. Finally, Section 3 outlines your right to a timely hearing.

### 1. Types of Offenses: Schedule A and Schedule B Offenses

The *Offender Rulebook* groups offenses into two categories—Schedule A and Schedule B offenses.<sup>7</sup> The type of offense you are charged with will determine both the severity (harshness) of the sanction you receive and the type of hearing you will be permitted.<sup>8</sup>

Schedule A offenses generally include lower level offenses and minor violations. These offenses include<sup>9</sup>:

- 1) **Disobedience:** Limited to disobedience of posted prison policies and regulations.<sup>10</sup>
- 2) **Disorderly Conduct:** Such as horseplay, cutting lines, and unpermitted talking.<sup>11</sup>
- 3) **Disrespect:** Includes disrespectful communication towards employees, guests, etc.<sup>12</sup>
- 4) **Radio/Tape, CD or Electronic Media Player Abuse:** Limited to disobedience of posted policies.<sup>13</sup>
- 5) **Unsanitary Practices:** Includes spitting, littering, failing to be neat (clothing/bed), and chewing gum in the kitchen or dining area.<sup>14</sup>

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<sup>5</sup> LA. ADMIN. CODE tit. 22, § 341D(3) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 3 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Mar. 23, 2014) (“All offenders sentenced to the custody of the Department of Public Safety and Corrections . . . shall be placed on notice as to the requirements of the *Disciplinary Rules and Procedures for Adult Offenders* by providing each offender with a copy of the rules and obtaining a signed receipt.”).

<sup>6</sup> The content for the *Offender Rulebook* is derived from Title 22 of the Louisiana Administrative Code, entitled Corrections, Criminal Justice and Law Enforcement. The relevant portions of this document can be found in Section 341 through Section 369, *available at* <http://www.doa.la.gov/pages/osr/lac/books.aspx> (last visited Jan. 11, 2018).

<sup>7</sup> La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 20–29 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Mar. 23, 2014).

<sup>8</sup> LA. ADMIN. CODE tit. 22, § 341I (2017) (noting that a prisoner “found guilty of violating one or more of the rules defined” in this section “will be sanctioned according to the penalty schedule designated in the rule and the type of hearing provided”).

<sup>9</sup> The *Offender Rulebook* is regularly updated, and the offenses listed below may not include any recent changes or additions. Please refer to the most updated *Offender Rulebook* for an accurate list of offenses.

<sup>10</sup> LA. ADMIN. CODE tit. 22, § 341I (Rule 4) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 21 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Mar. 23, 2014).

<sup>11</sup> LA. ADMIN. CODE tit. 22, § 341I (Rule 6) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 21 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Mar. 23, 2014).

<sup>12</sup> LA. ADMIN. CODE tit. 22, § 341I (Rule 7) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 21 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Mar. 23, 2014).

<sup>13</sup> LA. ADMIN. CODE tit. 22, § 341I (Rule 18) (2017) (noting potential sanctions include confiscation of the radio/tape player, CD player, or electronic media player for up to 30 days); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 24 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Mar. 23, 2014) (noting potential sanction may also include a ban on use of the item for a year).

<sup>14</sup> LA. ADMIN. CODE tit. 22, § 341I (Rule 26) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 26 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Mar. 23, 2014).

- 6) **Work Offenses:** Includes failure to do work assignments quickly and efficiently.<sup>15</sup>

Schedule B offenses are more serious violations, which can result in the most serious of sanctions, such as detention or loss of good time. These offenses include:

- 1) **Contraband:** Includes possession or smuggling of illicit drugs, alcohol, cell phones, money, and other items.<sup>16</sup>
- 2) **Defiance:** Committing or threatening to commit bodily harm upon another person, including cursing, threatening, spitting on, or hitting an employee, guest, etc.<sup>17</sup>
- 3) **Disobedience, Aggravated:** Failure to obey or cooperate promptly with verbal orders.<sup>18</sup>
- 4) **Disturbance:** Participating, or inciting others to participate, in a violent disturbance.<sup>19</sup>
- 5) **Escape or Attempted Escape:** Includes attempted, simple, and aggravated escapes.<sup>20</sup>
- 6) **Fighting:** Any hostile physical contact or even attempted physical contact.<sup>21</sup>
- 7) **Gambling:** Participating in gambling, or being in possession of items related to gambling.<sup>22</sup>
- 8) **General Prohibited Behaviors:** A “catch-all” of offenses that may threaten security.<sup>23</sup>
- 9) **Intoxication:** Prohibits being under the influence of any intoxicating substance while in physical custody and when returning from a furlough.<sup>24</sup>

<sup>15</sup> LA. ADMIN. CODE tit. 22, § 341I (Rule 27) (2017) (stating being present but not answering at the proper time at work roll call is an example of a violation); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 26 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Mar. 23, 2014).

<sup>16</sup> LA. ADMIN. CODE tit. 22, § 341I (Rule 1) (2017) (noting that a prisoner is responsible for all areas within his immediate control, including his storage area, room, bed, laundry bag, and even his assigned job equipment, and that if contraband is found in a cell shared by two prisoners, both prisoners are assigned equal responsibility for the items); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 20 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Mar. 23, 2014).

<sup>17</sup> LA. ADMIN. CODE tit. 22, § 341I (Rule 3) (2017) (noting prisoners are, however, permitted to inform a prison official of potential legal redress they may seek, even during a confrontational situation with that prison official); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 20–21 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Mar. 23, 2014).

<sup>18</sup> LA. ADMIN. CODE tit. 22, § 341I (Rule 5) (2017) (noting the only valid defense for disobedience or aggravated disobedience “is when the immediate result of obedience would be bodily injury”); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 21 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Mar. 23, 2014).

<sup>19</sup> LA. ADMIN. CODE tit. 22, § 341I (Rule 29) (2017) (noting a “disturbance” includes any act of resistance by two or more offenders which may threaten the lawful authority of the correctional officers or their facility); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 27 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Mar. 23, 2014).

<sup>20</sup> The Louisiana Code defines a “simple escape” as “[t]he intentional, unauthorized departure of an offender under circumstances in which human life was not endangered.” The Code defines an “aggravated escape” as “[t]he intentional, unauthorized departure of an offender under circumstances in which human life was endangered.” *See* LA. ADMIN. CODE tit. 22, § 341I (Rule 8) (2017) (noting an escape may include the unintentional failure of a prisoner to return to his place of confinement at the appointed time); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 21–22 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Mar. 23, 2014).

<sup>21</sup> LA. ADMIN. CODE tit. 22, § 341I (Rule 10) (2017) (noting “self-defense” is a possible defense to any charge of fighting); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 22 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Mar. 23, 2014).

<sup>22</sup> LA. ADMIN. CODE tit. 22, § 341I (Rule 12) (2017); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 23 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Mar. 23, 2014).

<sup>23</sup> LA. ADMIN. CODE tit. 22, § 341I (Rule 30) (2017); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 27–29 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Mar. 23, 2014).

<sup>24</sup> LA. ADMIN. CODE tit. 22, § 341I (Rule 14) (2017). Strict liability applies in the case of intoxication, which means you can be found guilty of intoxication even if you did not know the substance you consumed was drugs or alcohol, or even if you did not intend to become intoxicated; the only requirement for this violation is that you are indeed intoxicated. *See* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 23 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

- 10) **Malingering:** Includes making medical complaints that are deemed to lack merit.<sup>25</sup>
- 11) **Property Destruction:** Prohibits prisoners from even destroying their own property.<sup>26</sup>
- 12) **Self-Mutilation:** Deliberately inflicting or attempting to inflict injury upon one's self or another. Tattooing or piercing yourself or others is considered self-mutilation.<sup>27</sup>
- 13) **Sex Offenses, Aggravated:** Includes both non-consensual and consensual sexual acts.<sup>28</sup>
- 14) **Theft:** Forgery, fraud, or submitting false information, are all included in this offense.<sup>29</sup>
- 15) **Unauthorized Area:** Requires you to remain in "authorized" areas only.<sup>30</sup>
- 16) **Work Offenses, Aggravated:** Includes directly refusing to perform your work assignment, hiding out from work or leaving the work area without permission, and requesting to go to administrative segregation rather than work.<sup>31</sup>

If you are charged with either a Schedule A or Schedule B offense, it is important to immediately review the offense in the *Offender Rulebook* to determine two things. First, is there a specific defense you may raise? Some offenses have specific defenses you can raise which will keep the prison official from punishing you at all.<sup>32</sup> If you raise this defense you may not have to participate in a Low Court or High Court Hearing (discussed below), and your violation will immediately be dismissed. Second, were you charged with the right level of offense? If you believe you were charged with a Schedule B offense when you should have been charged with a Schedule A offense, you must raise this objection *immediately* in your Low Court or High Court Hearing, or request a change to the disciplinary report prior to the hearing.

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<sup>25</sup> LA. ADMIN. CODE tit. 22, § 341I (Rule 15) (2017); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 23 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>26</sup> LA. ADMIN. CODE tit. 22, § 341I (Rule 17) (2017) (including flooding an area, shaking doors, and standing or sitting on face bowls); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 23 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017). Prisoners may, however, raise negligence as a possible defense to the charge of property destruction.

<sup>27</sup> LA. ADMIN. CODE tit. 22, § 341I (Rule 19) (2017); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 24 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017). Consent is not a defense to the offense of self-mutilation.

<sup>28</sup> LA. ADMIN. CODE tit. 22, § 341I (Rule 21) (2017) (including consensual sexual contact with a staff member, deliberate exposure of your genitals to either staff or employees, and making overt sexual remarks, gestures or sounds); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 24–25 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>29</sup> "Forgery" is defined as "the unauthorized altering or signing of a document(s) to secure material return and/or special favors or considerations." *See* LA. ADMIN. CODE tit. 22, § 341I (Rule 22) (2017); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 25–26 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>30</sup> LA. ADMIN. CODE tit. 22, § 341I (Rule 24) (2017); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 26 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017) (noting incorrectly that this is a Schedule A offense).

<sup>31</sup> School assignments are considered work assignments for the purpose of this offense, and "refusing to work" includes being absent, showing up late, or not adequately performing your task. *See* LA. ADMIN. CODE tit. 22, § 341I (Rule 28) (2017); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 26–27 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>32</sup> *See, e.g.*, LA. ADMIN. CODE tit. 22, § 341I (Rule 4) (2017) (permitting a prisoner to escape sanctions if he disobeyed a posted policy in order to avoid "bodily injury"); LA. ADMIN. CODE tit. 22, § 341I (Rule 10) (2017) (permitting "self-defense" as a way to escape sanctions for "fighting"); LA. ADMIN. CODE tit. 22, § 341I (Rule 17) (2017) (permitting "negligence" as a potential defense to the destruction of property).



## 2. Types of Hearings: Low Court and High Court Hearings

### a. Low Court Hearings

If you are accused of committing a Schedule A offense, you will generally be limited to a Low Court Hearing conducted by a single disciplinary officer.<sup>33</sup> Low Court Hearings are run by a prison official who must be either: (1) a ranking security officer (lieutenant or above), or (2) a supervisory level employee from administration or treatment who is appointed by the warden or a designee who specifically conducts hearings of minor offenses.<sup>34</sup> Prison officials who are directly involved in the incident, or who may be biased against you, cannot hear the case without your direct approval or waiver.<sup>35</sup> During a Low Court Hearing you have the right to represent yourself and to speak on your own behalf at the hearing.<sup>36</sup> However, you are not allowed to have counsel or a substitute for counsel present. Additionally, you do not have the right to present witnesses or to confront (challenge) the accusing prison officer, and these hearings are not recorded.<sup>37</sup> As such, the protections afforded to you in these informal Low Court Hearings are greatly limited.

### b. High Court Hearing

If you are accused of committing a Schedule B offense—or if you are appealing a Low Court Hearing for a Schedule A offense—you will participate in a High Court Hearing.<sup>38</sup> High Court Hearings consist of a “board” of two prison officials—an authorized member (approved by the warden or designee) and an authorized chairman (approved by the secretary or designee)—and both officials must represent a different section of the prison (such as security, administration, or treatment).<sup>39</sup> As in the case of a Low Court Hearing, you are protected by the fact that prison officials who are directly involved in the incident, or who may be biased against you, cannot hear the case without your direct approval or waiver.<sup>40</sup> You are also protected by the fact that decisions must be unanimous (meaning that both officials conducting the hearing must agree). Decisions that are not unanimous are referred to a different disciplinary board for a new hearing.<sup>41</sup> There are many rights and protections provided to you in High Court Hearings, and these are detailed in Part C and Part D of this Chapter.

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<sup>33</sup> LA. ADMIN. CODE tit. 22, § 341G(2) (2017); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 8–9 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>34</sup> LA. ADMIN. CODE tit. 22, § 341G(2)(a) (2014); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 8 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>35</sup> LA. ADMIN. CODE tit. 22, § 341G(2)(b) (2017); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 8 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017). This rule does not necessarily exclude prison officers who discovered the violation through routine administrative duty, such as routine inspections, from the hearing.

<sup>36</sup> LA. ADMIN. CODE tit. 22, § 341G(2)(c) (2017); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 8 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>37</sup> LA. ADMIN. CODE tit. 22, § 341G(2)(d)–(e) (2017); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 8–9 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>38</sup> LA. ADMIN. CODE tit. 22, § 341G(3), H(1)(a)(i) (2017); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 8, 18 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>39</sup> LA. ADMIN. CODE tit. 22, § 341G(3)(b) (2017); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 8 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>40</sup> LA. ADMIN. CODE tit. 22, § 341G(3)(d) (2017); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 11–12 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017). Like Schedule A hearings, this rule does not include prison officers who discover the violation through routine administrative duty such as routine inspections, etc.

<sup>41</sup> LA. ADMIN. CODE tit. 22, § 341G(3)(e) (2017); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 8 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017). If the second decision is also not unanimous then a finding

### 3. The Right to a Timely Hearing

If you commit either a Schedule A or Schedule B offense, you have the right to a hearing (either a Low Court Hearing or a High Court Hearing, depending on the type of offense) to be held within seven days of the prison official filing their report.<sup>42</sup> This seven-day requirement does not include weekends and holidays, and may be delayed in the case of “exceptional circumstances, unavoidable delays or reasonable postponements.”<sup>43</sup> In the case of a delay, the reasons for that delay should be documented by prison officials.<sup>44</sup>

There are certain exceptions to this standard rule. For example, if you are placed in administrative segregation pending the hearing, then the hearing must take place within seventy-two hours.<sup>45</sup> However, the seventy-two-hour period “does not begin to run until an inmate is placed into administrative segregation,” and the time spent in a holding cell (or similar types of confinement) prior to being placed in administrative segregation does not count against the seventy-two-hour limit.<sup>46</sup>

## C. WHAT TO EXPECT AT YOUR HIGH COURT HEARING

Part C discusses what you should expect at a High Court Hearing, which will be held if you have been accused of a Schedule B offense or are appealing a Schedule A offense. High Court Hearings are governed by a number of procedures. Some of these procedures must be followed by the prison officials—the “board”—and some of these procedures must be followed by the prisoner. The *procedures prison officials* must follow were for the most part created to ensure *efficient* hearings are held in a *consistent* manner. These procedures are not likely to have a big impact on the outcome of your case, and should be reviewed only to better understand what to expect on the day of your hearing. However, the *procedures created for prisoners* can greatly impact your case, and it is very important that you learn these procedures and use them to the best of your advantage. The consequences for not learning these procedures can be severe. For example, your right to appeal the finding of a High Court Hearing may be lost if you do not follow certain procedures.<sup>47</sup>

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of “not guilty” is appropriate. *See* LA. ADMIN. CODE tit. 22, § 341G(3)(f) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 8 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>42</sup> *See* LA. ADMIN. CODE tit. 22, § 341G(2)(f) (2017) for Low Court Hearings, and LA. ADMIN. CODE tit. 22, § 341G(3)(d) (2017) for High Court Hearings; *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 8–9 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>43</sup> *See* LA. ADMIN. CODE tit. 22, § 341G(2)(f) (2017) for Low Court Hearings, and LA. ADMIN. CODE tit. 22, § 341G(3)(d) (2017) for High Court Hearings; *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 8–9 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>44</sup> *See* LA. ADMIN. CODE tit. 22, §§ 341G(2)(f), G(3)(d) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 8–9 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>45</sup> LA. ADMIN. CODE tit. 22, § 341G(3)(c)(i), J(2) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 11 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017). The *Rulebook*, but not the Code, states that weekends, holidays, genuine emergencies, and good faith efforts by the administration to provide a timely hearing are the only acceptable reasons for not granting a hearing within seventy-two hours, and even if such unusual circumstances arise, the prisoner must be brought before the board and explained the reasons for the delay. After meeting with the board, the prisoner is remanded back to administrative segregation or released to his living area after the hearing date is set. *See* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 11 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>46</sup> *Hayes v. Goodwin*, 2011-0310, p. 2 (La. App. 1 Cir. 9/14/11); 2011 LEXIS 553, at \*4–5; 2011 WL 4433585, at \*2 (unpublished) (finding the prisoner failed to present evidence showing that the conditions of his confinement in the holding area of a local parish facility met the definition of administrative segregation as defined in the Louisiana code).

<sup>47</sup> For example, if you do not raise a preliminary motion prior to presenting your defense, then such motions are waived and you are not permitted to raise them upon appeal. For a list of these preliminary motions, *see* LA. ADMIN.

The High Court Hearing will begin with the board asking you if you are familiar with all your rights.<sup>48</sup> The rights they are referring to are those listed in the *Offender Rulebook*,<sup>49</sup> and are outlined in Sections 1 and 2 in Part D of this Chapter. The hearing will begin only after you acknowledge you are familiar with these rights. If you state that you are unfamiliar with your rights, then the board will explain them to you.<sup>50</sup> In either case, following either your acknowledgement or the board's explanation of your rights, you will no longer be permitted to claim you do not know these rights, either during the High Court Hearing or on appeal.

Next, the board will ask you to enter your name and DOC number into the record.<sup>51</sup> Then the chairman of the board will read the disciplinary report out loud and request that you state a plea of guilty or not guilty.<sup>52</sup> There are a number of things to consider when deciding whether to plead guilty or not guilty. Prisoners may be encouraged by prison officials to plead guilty in order to show remorse and receive a lower sentence. However, if you plead guilty or are found guilty of the violation, this record will likely be used against you at a later hearing or when you go for parole. Also, if you enter a plea of "guilty," you waive the right to appeal the disciplinary charge, meaning you cannot later argue you should have been sentenced to a Schedule A violation when you pleaded guilty to a Sentence B violation.<sup>53</sup> The only thing you can appeal if you enter a plea of "guilty" is the punishment imposed.<sup>54</sup> Because the board is granted wide discretion (meaning they can choose from a wide range of choices) in determining the severity of the punishment, it is unlikely your appeal will be granted on these grounds.<sup>55</sup> Note that if you refuse to enter a plea of guilty or

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CODE tit. 22, § 341G(4)(g)(i)–(vi) (2017); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 12–13 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>48</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(a) (2017); *see also* La. Admin. Code tit. 22, § 341J (2017) (listing prisoner rights and responsibilities during High Court Hearings); La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 11–12 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017) (listing prisoner rights and responsibilities during High Court Hearings).

<sup>49</sup> La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 11–14 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>50</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(e) (2017) ("If the offender indicates he does not know or understand his rights, they must be explained to him."); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 12 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>51</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(e) (2017); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 12 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>52</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(f) (2017); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 12 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2014).

<sup>53</sup> *Simon v. Stalder*, 2008-2318, p. 2 (La. App. 1 Cir. 5/8/09); 2009 LEXIS 240, at \*4; 2009 WL 1270566, at \*2 (unpublished). In *Simon*, the prisoner pleaded guilty to a Schedule B violation upon the advice of his inmate counsel but later discovered that the facts of the allegation supported only a Schedule A violation. In spite of the prisoner's evidence that he was guilty only of a Schedule A violation, the court held that when a prisoner voluntarily pleads guilty to a disciplinary charge (in this case, a Schedule B charge), he waives the opportunity to challenge the charge upon appeal.

<sup>54</sup> LA. ADMIN. CODE tit. 22, § 341H(1)(c)(ix) (2017) ("Absent unusual circumstances, the secretary[, who reviews appeals from decisions made by the prison warden,] will only consider review of the sanction(s) imposed of an offender who pled guilty."); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 19 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>55</sup> *Ford v. Dept. of Corr.*, 2009-0103, p. 1 (La. App. 1 Cir. 5/8/09); 2009 LEXIS 243, at \*1–4 2009 WL 1272349, at \*1 (unpublished). In *Ford*, the prisoner pleaded guilty to the alleged violations and admitted making certain statements but insisted during the hearing that the statements were misunderstood. The High Court found the prisoner guilty and imposed a harsh sentence. The prisoner appealed, claiming he never pleaded guilty. The Louisiana Court of Appeals held that a plea of guilty had been entered and the prisoner could not challenge the disciplinary charge. However, the court noted the prisoner could still appeal the severity of the sentence, and that the court could reverse and remand the decision if they found the High Court abused its discretion. In this case, such abuse was not found, even though the court observed that "the two penalties in this matter might be viewed as somewhat harsh for the particular incident."

not guilty, the chairman of the board will enter a plea of not guilty on your behalf, and the hearing will begin.<sup>56</sup>

After your plea is entered you must make all preliminary motions that are available to you. Preliminary motions are requests to the board to decide particular issues before the hearing starts. If you fail to make these preliminary motions right after you submit your plea, then the board will consider them waived and you will not be permitted to raise these motions at any later stage, including upon appeal.<sup>57</sup> It is also essential to raise all possible preliminary motions at the same time in the proceedings or else they will be considered waived.<sup>58</sup> Preliminary motions available to the accused prisoner include: (1) dismissal of charges, (2) a request for a continuance, which temporarily halts the proceedings,<sup>59</sup> (3) a request to confront your accuser or call witnesses, (4) an objection based on the claim prison officials did not meet their “written notice requirement” (discussed in Part D of this Chapter), (5) a request for further investigation, or, (6) any other appropriate motions.<sup>60</sup> Other appropriate motions you may consider include a request for the board to reevaluate the disciplinary charge and reduce it from a Schedule B offense to a Schedule A offense, or a request to escape culpability (blame) by asserting an affirmative defense.<sup>61</sup> The board will then rule on these preliminary motions immediately, unless the board determines they cannot decide the motion until reviewing evidence which will be presented during the hearing, in which case the board must “expressly [defer its decision] to the actual hearing.”<sup>62</sup>

After preliminary motions have been made and ruled on you will be allowed to present your defense.<sup>63</sup> Your defense is limited to your own statements, unless you entered a preliminary motion to either call witnesses or confront your accusers.<sup>64</sup> The board can interrupt your statement to ask you questions, or to question your witnesses or accuser if the board has granted your preliminary motion.<sup>65</sup> Note that during

<sup>56</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(f) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 12 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>57</sup> LA. ADMIN. CODE tit. 22, §§ 341G(4)(g)–(h) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 12–13 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>58</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(h) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 12 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>59</sup> Note that you cannot move for a continuance to obtain counsel unless you are charged with a violation that is also a crime under state law. Furthermore, only one motion for a continuance will be granted “unless new information is produced.” LA. ADMIN. CODE tit. 22, § 341G(4)(g)(ii) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 12 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>60</sup> LA. ADMIN. CODE tit. 22, §§ 341G(4)(g)(i)–(vi) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 12–13 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>61</sup> *See, e.g.*, LA. ADMIN. CODE tit. 22, § 341I (Rule 4) (2017) (permitting a prisoner to escape sanctions if he disobeyed a posted policy in order to avoid “bodily injury”); LA. ADMIN. CODE tit. 22, § 341I (Rule 10) (2017) (permitting “self-defense” as a way to escape sanctions for “fighting”); LA. ADMIN. CODE tit. 22, § 341I (Rule 17) (2017) (permitting “negligence” as a potential defense to the destruction of property).

<sup>62</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(i) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 13 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017). The Louisiana Code also provides that prisoners are entitled to written reasons for each ruling. *See* LA. ADMIN. CODE tit. 22, § 341G(4)(j) (2014); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 13 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>63</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(k) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 13 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 5, 2017).

<sup>64</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(g)(iii) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 13 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017).

<sup>65</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(l) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 13 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017).

the hearing, your accuser should only be present to testify about what happened. The accuser should never be present during deliberations.<sup>66</sup>

After you have finished presenting your defense, the board will deliberate. At this point all non-board members must exit the room, except official observers who may remain but not participate in the deliberation.<sup>67</sup> The board will consider all the evidence submitted in order to determine both the decision and the punishment (if any). To inform its decision, the board may also review your prior disciplinary record to determine if a trend or pattern of behavior exists.<sup>68</sup> Such a pattern of behavior may tip the balance of evidence or lead to a harsher punishment.<sup>69</sup> Following deliberations, the chairman will announce the verdict and any associated punishment.<sup>70</sup> The chairman must clearly state which punishment applies to each rule violation for which you are found guilty,<sup>71</sup> and the board also has the power to suspend any punishment for up to ninety days.<sup>72</sup>

#### D. THE RIGHTS OF A PRISONER IN HIGH COURT HEARINGS

Prisoners are provided a number of rights they may exercise during a High Court Hearing. Some of these rights can be exercised prior to and in preparation for the High Court Hearing, while others are best exercised during the High Court Hearing proceedings themselves. Note that in almost all cases you are not *required* to exercise these rights. They are available to you as an option, and you may waive them at any time.<sup>73</sup>

##### 1. Rights to Exercise Prior to Your High Court Hearing

In addition to your general right to a timely hearing (*see* Section 3 in Part B of this Chapter), there are two other rights you can exercise prior to your High Court Hearing. The first right is the “written notice requirement,” which says that you must be given a copy of the disciplinary report describing the charges against you at least twenty-four hours before your hearing begins.<sup>74</sup> The purpose of this right is to make sure that you have proper “notice” (warning) about the charges that you will be required to defend yourself against in the upcoming hearing. It is important you keep a copy of this notice for your records, and a copy

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<sup>66</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(j) (2017).

<sup>67</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(o)(i) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 13 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017).

<sup>68</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(o)(iii) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 13 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017).

<sup>69</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(o)(iv) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 13 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017).

<sup>70</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(p)–(q) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 13 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017).

<sup>71</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(r) (2017).

<sup>72</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(s) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 13 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017).

<sup>73</sup> *See* LA. ADMIN. CODE tit. 22, § 341G(4)(b) (2017) (“All rights and procedural requirements must be followed unless waived by the accused.”); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 12 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017) (same).

<sup>74</sup> LA. ADMIN. CODE tit. 22, § 341F(1)(a)(ii)(a) (2017) (“Offenders shall be served (usually by a correctional officer) with notice of charges at least 24 hours prior to the hearing.”); *see also* LA. ADMIN. CODE tit. 22, § 341J(1) (2017) (noting prisoners have “the right to be given a written copy of the disciplinary report at least 24 hours before the hearing begins which describes the contents of the charges against the offender (unless waived by him in writing)”); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 12 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017).

of all other documents related to your disciplinary proceeding.<sup>75</sup> If you do not receive a copy of the report at least twenty-four hours before your hearing, you should state this at your High Court Hearing and request the hearing be moved to a later date. If your objection is denied, you may appeal the decision of the High Court Hearing on this issue. However, your appeal may be denied if you cannot allege facts showing a violation of your substantial (important) rights.<sup>76</sup>

The second right you may exercise prior to your High Court Hearing is to request a Counsel Substitute or Retained Counsel.<sup>77</sup> Counsel Substitutes are “persons not admitted to the practice of law, but offenders who aid and assist, without cost or fee, an accused offender in the preparation and presentation of his defense and/or appeal.”<sup>78</sup> Such Counsel Substitutes must be appointed by the warden or designee, and may be removed by the warden or designee if they believe it is “appropriate.”<sup>79</sup> The right to a Counsel Substitute is provided for all alleged violations of prison rules,<sup>80</sup> and is required if you either refuse to participate in the hearing or are highly disruptive and uncooperative during a proceeding.<sup>81</sup> Retained Counsel, on the other hand, are persons admitted to the bar and whose profession it is to provide legal services.<sup>82</sup> You only have a right to Retained Counsel if you are accused of violating a rule or law for which you could also be charged in criminal court—such as possession of illegal drugs, rape, or aggravated battery.<sup>83</sup>

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<sup>75</sup> You should request a copy of all official documents related to your disciplinary hearing and keep a copy of these documents for your record. This will protect you should the institution claim to lose or be unable to locate your official records. If prison officials will not make a copy of official documents for your own record, you should make a handwritten copy of the original record.

<sup>76</sup> See *Plaisance v. La. State Penitentiary*, 2010-1249, p. 3 (La. App. 1 Cir. 2/11/11); 57 So. 3d 593, 595 (suggesting that even if the prisoner was not provided with a copy of the disciplinary report, this did not constitute a violation of his “substantial rights” and therefore the prisoner was not entitled to judicial review).

<sup>77</sup> LA. ADMIN. CODE tit. 22, §341J(3) (2017) (providing that prisoners are given “the right to counsel substitute for all alleged violations or the right to retained counsel, if the alleged violation is one for which the offender could also be charged in a criminal court”); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 11 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017).

<sup>78</sup> LA. ADMIN. CODE tit. 22, § 341F(1)(b)(ii) (2017); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 4 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017).

<sup>79</sup> LA. ADMIN. CODE tit. 22, § 341F(1)(b)(iii) (2017); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 8 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017).

<sup>80</sup> LA. ADMIN. CODE tit. 22, § 341J(3) (2017); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 11 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017).

<sup>81</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(d) (2017) (noting that a “counsel substitute” shall represent and “enter a not guilty plea” for a prisoner “who does not choose to be present at the hearing,” and that the “same applies to a disruptive offender who refuses to cooperate”); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 12 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017).

<sup>82</sup> LA. ADMIN. CODE tit. 22, § 341F(1)(b)(i) (2017) (“Counsel is an attorney-at-law of the offender’s choice who has been retained by the offender.”); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 4 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017) (“Counsel is an attorney-at-law of the offender’s choice who has been retained by the offender or offender’s family for the purpose of representing the offender.”). There are multiple online resources available to assist you in finding Retained Counsel specific for your needs. One such source is the ACLU Prisoner’s Assistance Directory. You may download a copy of this list at <http://www.aclu.org/prisoners-rights/prisoners-assistance-directory-2008>, or contact your local ACLU office for a copy at <http://www.laaclu.org>. You may also refer to Chapter 4 of the main *JLM*, “How to Find a Lawyer.”

<sup>83</sup> LA. ADMIN. CODE tit. 22, § 341J(3) (2017); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 11 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017).

## 2. Rights to Exercise During Your High Court Hearing

Your most important rights at a High Court Hearing are to present evidence, call witnesses, and cross-examine your accusers.<sup>84</sup> These, however, are not absolute rights; if you want to exercise these rights, you *must* make a preliminary motion at the beginning of your High Court Hearing and submit to the board your request to call witnesses or cross-examine accusers.<sup>85</sup> Requests to cross-examine your accusers must be “relevant, not repetitious, not unduly burdensome to the institution and/or not unduly hazardous to staff, offender, or safety”<sup>86</sup> However, the board’s discretion (freedom) to deny your right to call witnesses or accusers is not absolute. If the information underlying an accusation comes entirely from confidential informants, then the accusing employee *must* be present to testify, but this is the case *only if* you enter a preliminary motion requesting his attendance.<sup>87</sup>

The right to present and challenge evidence is equally important because the board is required to “carefully evaluate all evidence presented or stipulated.”<sup>88</sup> Some types of evidence may require additional support, and you can challenge the evidence if such support is not provided. For example, if a disciplinary report is based entirely on information from one confidential informant or known offender, then there must be other evidence to corroborate (support) the violation before a board can find you guilty,<sup>89</sup> though this standard is loosely enforced.<sup>90</sup> Even evidence that is presented to corroborate the violation may be challenged, especially if such evidence is based entirely on hearsay statements (statements made by other people, not during or in preparation for the High Court Hearing, that are being used against you by relying on the truth of the statement itself). Courts traditionally distrust hearsay statements, and if you can

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<sup>84</sup> LA. ADMIN. CODE tit. 22, § 341J(5) (2017); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 11 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017).

<sup>85</sup> *See* LA. ADMIN. CODE tit. 22, § 341G(4)(g) (2017) (listing among those preliminary motions that “must be raised at the first opportunity or be considered waived . . . requests to face [your] accuser and call witnesses”); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 12–13 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017) (same).

<sup>86</sup> LA. ADMIN. CODE tit. 22, § 341J(5) (2017); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 11 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017). The board may also exercise the option of stipulating expected testimony from witnesses, meaning the board may request statements from witnesses to be read into the record in lieu (instead) of the witness directly testifying.

<sup>87</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(n) (2017) (“If requested, the accusing employee must be summoned to testify about the reliability and credibility of the confidential informant(s) when the disciplinary report is based solely on information from confidential informants.”); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 11 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017) (using similar language); *see, e.g.*, Singleton v. La. Dep’t. of Pub. Safety & Corr. *ex. re/* Elayn Hunt Corr. Ctr., 2003-1294, p. 2 (La. App. 1 Cir. 4/2/04); 878 So. 2d 555, 556 (stating that “[m]ust’ is mandatory language . . . [a]nd, ‘[I]f the rules are stated in mandatory language, they must be obeyed and followed”) (citation omitted) (quoting Fegan v. Lykes Bros. S.S. Co., 3 So. 2d 632, 635 (La. 1941)).

<sup>88</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(m) (2017); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 14 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017).

<sup>89</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(n) (2017) (“In situations where the disciplinary report is based on a single confidential informant, there must be other evidence to corroborate the violation.”); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 14 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017) (“When the Disciplinary Report is based solely on information from a Confidential Informant, two witnesses (who may be other Confidential Informants) must corroborate the record or other evidence.”). The Louisiana Code also provides that such corroborating evidence may include a witness statement from a second confidential informant, but only if that informant has proven reliable in the past.

<sup>90</sup> *See* Giles v. Cain, 1999-1201, p. 6 (La. App. 1 Cir. 6/23/00); 762 So. 2d 734, 739 (holding that the failure of prison officials to follow required procedure and whether that warrants reversal is dependent on whether the sanction imposed goes to a substantial right of the prisoner).

undermine (poke holes in) the reliability or trustworthiness of those hearsay statements, the board may not be permitted to rely on them to find you guilty.<sup>91</sup>

You also have a number of procedural rights which you should exercise during the proceeding. You have a right to be present at the hearing.<sup>92</sup> This right may be waived if you are disruptive or refuse to cooperate during the proceeding,<sup>93</sup> and may not apply to certain proceedings of the High Court Hearing, such as during deliberations.<sup>94</sup> You also have the right not to be compelled to incriminate yourself, meaning you do not have to admit to facts or make statements that may help prove the violation with which you are charged.<sup>95</sup> Even if you plead guilty, you may want to exercise this right to ensure you do not offer additional incriminating information that may lead to a new charge. And as previously mentioned, you have a right to request a Counsel Substitute (*see* Section 1 in Part D of this Chapter) and the right to an unbiased board (*see* Section 2 in Part B of this Chapter).<sup>96</sup> This right is particularly helpful if you plan to plead not guilty, are unfamiliar with the disciplinary process, and could benefit from a Counsel Substitute with more experience.

## E. SANCTIONS

If you are found guilty of either a Schedule A or a Schedule B offense you will be subject to sanctions (penalties). Sanctions are calculated based on the specific offense and your prior record.<sup>97</sup> More serious offenses usually result in more serious sanctions, and minor offenses will result in less serious sanctions. However, a history of good or bad behavior can significantly increase or decrease the sanctions you would otherwise face based on the violation alone. For example, if a prisoner is classified as a “habitual offender”—meaning he has been convicted of three major violations (Schedule B offenses) or a total of five violations in six months—prison officials are permitted to provide Schedule B sanctions following a finding of guilt for a Schedule A violation.<sup>98</sup>

<sup>91</sup> *See* Chaisson v. Cajun Bag & Supply Co., 97-1225, p. 20 (La. 3/4/98); 708 So. 2d 375, 382 (holding that for hearsay evidence to qualify as “competent evidence” in administrative hearings, the evidence must have “some degree of reliability and trustworthiness” and be “the type that reasonable persons would rely upon”).

<sup>92</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(d) (2017); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 12 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017).

<sup>93</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(d) (2017) (“An offender who does not choose to be present at the hearing may sign a waiver which shall be read into the record. A counsel substitute shall represent him and enter a not guilty plea. The same applies to a disruptive offender who refuses to cooperate.”); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 12 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017) (providing the same procedural right).

<sup>94</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(o)(i) (2017) (“During deliberations, everyone except the board and any official observers must leave the room . . . .”); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 13 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017).

<sup>95</sup> LA. ADMIN. CODE tit. 22, § 341J(4) (2017); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 11 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017).

<sup>96</sup> In addition to the protections against bias listed in Section 2 of Part B, High Court Hearings also forbid those in a therapeutic relationship with a prisoner (such as a psychiatrist or psychologist) from sitting on the board without the direct approval or waiver of the prisoner. *See* LA. ADMIN. CODE tit. 22, § 341J(6) (2017) (“Any chairman or member . . . who is in a therapeutic relationship with the offender that would be jeopardized by the therapist’s presence on the disciplinary board, cannot hear the case unless the accused waives recusal in writing or verbally on the record.”); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 11–12 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017) (noting same).

<sup>97</sup> LA. ADMIN. CODE tit. 22, § 341G(6)(a) (2017) (“Sanctions must fit the offense and the offender. An offender with a poor conduct record may receive a more severe sanction than an offender with a good conduct record for the same offense. Even so, serious offenses call for serious penalties.”); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 15 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017) (same).

<sup>98</sup> LA. ADMIN. CODE tit. 22, § 341G(6)(f) (2017); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 15 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017).



Yet, prison officials do not have the power to impose whatever sanctions they desire. Both the schedule level of the violation (Schedule A or Schedule B offenses) and venue (type and location) for your proceedings (Low Court Hearing or High Court Hearing) limit how prison officials assign sanctions. Specifically, these limits serve to regulate both the *type* of sanctions prison officials may impose and the *number* of sanctions that may be applied.<sup>99</sup> For example, prison officials are limited to impose only one or two specific sanctions per violation.<sup>100</sup>

In addition to the ordinary sanctions imposed by prison officials (such as reprimand or disciplinary detention), prisoners found guilty of violating prison rules may also be subject to other types of sanctions. Prisoners who violate criminal laws may have sanctions imposed as a result of separate state or federal prosecutions for criminal conduct.<sup>101</sup> This may result in a longer sentence. Also, prisoners who damage or steal property may be required to pay restitution (money paid to the institution to replace or repair the property) if the board decides to sanction you with an “Imposition of Restitution.”<sup>102</sup> These other types of sanctions are considered sanctions outside the disciplinary process, and thus are not subject to the standard rule of “one or two” sanctions per violation.<sup>103</sup>

### 1. Sanctions in Low Court Hearings

Low Court Hearings only apply to Schedule A offenses. If the disciplinary officer in charge of a Low Court Hearing finds you guilty, he may impose one *or* two of the following penalties for *each* separate violation committed:

- 1) A reprimand (warning);
- 2) Extra duty (up to four days for each violation); or
- 3) Loss of minor privileges (up to two weeks).<sup>104</sup>

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<sup>99</sup> See LA. ADMIN. CODE tit. 22, § 341I (2017) (providing that a prisoner “found guilty of violating one or more of the rules defined . . . will be sanctioned according to the penalty schedule designated in the rule and the type of hearing provided”); LA. ADMIN. CODE tit. 22, § 341K(2)(a)–(c) (2017) (listing penalty schedules according to the type of hearing (Low Court Hearing or High Court Hearing) and the type of offense (Schedule A or Schedule B)); see also La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 15–17 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017) (listing similar penalty schedules).

<sup>100</sup> LA. ADMIN. CODE tit. 22, § 341G(6)(g) (2017) (“After a finding of guilt, the disciplinary officer may impose one or two of the penalties for each violation.”); LA. ADMIN. CODE tit. 22, § 341(K)(1) (2014); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 15 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017) (same).

<sup>101</sup> LA. ADMIN. CODE tit. 22, § 341G(6)(d) (2017) (“State and federal criminal laws apply to offenders. In addition to being sanctioned by prison authorities, offenders may also be prosecuted in state and federal court for criminal conduct.”); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 15 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017) (same).

<sup>102</sup> Made in accordance with Department Regulation No. B-05-003. La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 15 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017); see also LA. ADMIN. CODE tit. 22, § 341G(6)(e) (2017) (“Restitution may be imposed in accordance with established policies and procedures and is not considered a disciplinary sanction and may be assessed in addition to any other permissible penalties.”).

<sup>103</sup> LA. ADMIN. CODE tit. 22, § 341G(6)(e) (2017) (“Restitution may be imposed in accordance with established policies and procedures and is not considered a disciplinary sanction and may be assessed in addition to any other permissible penalties.”); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 15 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017) (observing the same).

<sup>104</sup> LA. ADMIN. CODE tit. 22, § 341K(2)(a) (2017); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 15 (2008), *available at* [https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001\\_Offender\\_Rule\\_Book-1.pdf](https://cityoffaith.org/wp-content/uploads/2015/12/B-05-001_Offender_Rule_Book-1.pdf) (last visited Sept. 4, 2017).

For the purpose of sanctions, minor privileges include: use of radio/tape or CD or electronic media players and/or TV, recreation and yard activities, telephone (except for emergencies and legal purposes), movies, canteen privileges, and similar activities.<sup>105</sup>

## 2. Sanctions in High Court Hearings

High Court Hearings are typically limited to Schedule B offenses, but may include appeals by prisoners found guilty of Schedule A offenses or Schedule A offenses who are also habitual offenders.

### a. Schedule A Offenses

If the board in a High Court Hearing finds you guilty of a Schedule A offense, it may impose one *or* two of the following penalties for *each* separate violation:

- 1) A reprimand;
- 2) Extra duty (up to four days for each violation);
- 3) Loss of minor privilege (up to four weeks);
- 4) Disciplinary detention (up to five days for each violation);
- 5) Forfeiture of good time (up to a maximum of fifteen days for each violation);
- 6) A change in quarters;
- 7) A job change;
- 8) Confinement to dormitory, room, or cell (up to fourteen days); or
- 9) Inability to earn incentive wages (up to three months).<sup>106</sup>

### b. Schedule B Offenses

If the board in a High Court Hearing finds you guilty of a Schedule B violation, it may impose one *or* two of the following penalties for *each* separate violation:

- 1) A reprimand;
- 2) Extra duty (up to eight days for each violation);
- 3) Loss of minor privileges (up to twelve weeks, or twenty-four weeks if the violation involved abuse of that minor privilege);
- 4) Disciplinary detention (up to ten days for each violation);
- 5) Forfeiture of good time (up to a maximum of 180 days for attempted escape, battery of an officer, or physical possession of illegal drugs or a weapon, or forfeiture of all good time in the case of simple or aggravated escape, or 90 days for all other Schedule B violations);
- 6) A change in quarters;
- 7) A job change;
- 8) Confinement to dormitory, room, or cell (up to thirty days);
- 9) Inability to earn incentive wages (up to one year);
- 10) Loss of hobby craft (up to twelve months);
- 11) Loss of visiting privileges (if the violation involves this privilege);

<sup>105</sup> LA. ADMIN. CODE tit. 22, § 341K(2)(a) (2017). With regard to recreation and yard activities, the Louisiana Code provides that if “the offender is housed in Disciplinary Detention or Disciplinary Detention/Extended Lockdown, the offender must be allowed a 24-hour break with access to recreation and/or yard activities after ten consecutive days in Disciplinary Detention/Extended Lockdown before any subsequent imposition of this penalty.” See La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 15 (2008), *available at* <https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Oct. 29, 2017) (providing the same).

<sup>106</sup> LA. ADMIN. CODE tit. 22, § 341K(2)(b) (2017). The *Offender Rulebook* provides that forfeiture of good time can be imposed up to 30 days for each violation, but it is outdated, and the Louisiana Administrative Code overrules it. See La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 16 (2008), *available at* <https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017).

- 12) Custody change from minimum to medium custody status and/or transfer to another institution, or;
- 13) Custody change from minimum or medium to maximum custody status, working cellblock, or disciplinary detention/extended lockdown.<sup>107</sup>

c. Types of Segregation/Detention

Prisoners found guilty in a High Court Hearing are liable to be sanctioned to detention from the general population. Louisiana recognizes several different forms of detention, each with its own separate definition, policies, and limitations. These include: administrative segregation, protective custody, disciplinary detention, disciplinary detention/extended lockdown, and working cellblock. Definitions for each of these are found in the *Offender Rulebook*.<sup>108</sup>

## F. CHALLENGING YOUR ADMINISTRATIVE DECISION

All prisoners have the right to appeal a decision from either a Low Court or High Court Hearing.<sup>109</sup> The appeals process can really vary depending on where your claim began.

### 1. Challenging the Decision of a Low Court Hearing

The right to appeal a Low Court Hearing is limited. Your decision to appeal must be stated clearly to the prison officer administering your Low Court Hearing as soon as a ruling is issued, otherwise you lose your right to appeal entirely.<sup>110</sup> After receiving this notice, the prison officer will then suspend (put off) the sanction and schedule the case to be heard in a High Court Hearing. The proceedings in High Court will be the same as any other hearing conducted by the board.<sup>111</sup> Appealing to the High Court offers one significant protection—the High Court may not increase the sanction imposed by the disciplinary officer in the original Low Court Hearing.<sup>112</sup> However, the decision of the High Court represents the ultimate and final decision on your claim. No further appeals to any prison officials are permitted.<sup>113</sup>

<sup>107</sup> LA. ADMIN. CODE tit. 22, § 341K(2)(c) (2017). Note that some sanctions require review by the warden or designee every ninety days, such as any sanction involving the loss of visiting privileges.

<sup>108</sup> La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 4–6 (2008), *available at* <https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017).

<sup>109</sup> LA. ADMIN. CODE tit. 22, § 341J(9) (2017) (noting that all prisoners have “the right to appeal the decision consistent with the appropriate appeal procedure”); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 11 (2008), *available at* <https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017) (noting that before a high court hearing can begin, the prisoner “must acknowledge on the record that he is familiar with” “[t]he right to appeal consistent with the appeal procedure”).

<sup>110</sup> LA. ADMIN. CODE tit. 22, § 341H(1)(a)(ii) (2017) (“As soon as the ruling [in the Low Court Hearing] is issued, the offender who wants to appeal must clearly say so to the disciplinary officer who will then automatically suspend the sanction and schedule the case for the disciplinary board.”); *see also* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 18 (2008), *available at* <https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017) (stating the procedure in similar terms).

<sup>111</sup> LA. ADMIN. CODE tit. 22, § 341H(1)(a)(iii) (2017) (“The appeal hearing before the disciplinary board is a full hearing the same as any other hearing conducted by the board.”); La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 18 (2008), *available at* <https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017).

<sup>112</sup> LA. ADMIN. CODE tit. 22, § 341H(1)(a)(iii) (2017) (“The disciplinary board cannot increase the sanction imposed by the disciplinary officer.”); La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 18 (2008), *available at* <https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017) (“The Disciplinary Board cannot upgrade or increase the sanction imposed by the Disciplinary Officer.”).

<sup>113</sup> LA. ADMIN. CODE tit. 22, § 341H(1)(a)(iv) (2017) (“The appeal to the disciplinary board will be the final appeal in a case heard by the disciplinary officer. No other appeals are allowed.”); La. Dep't. of Pub. Safety & Corr., Disciplinary

## 2. Challenging the Decision of a High Court Hearing

The right to appeal a High Court decision is larger than the right to appeal a Low Court decision. The most noticeable difference is that prisoners are provided a number of resources to aid in their appeal of High Court decisions. First, you have the right to a written summary of the evidence and the reasons for the judgment entered in the original High Court Hearing.<sup>114</sup> The written summary will serve as the very basis for the appeal and it is therefore critical you obtain a copy of this record. Convicted offenders typically receive a written summary of the proceedings soon after the decision is delivered,<sup>115</sup> but you should request one if it has not been provided. This right is limited, however, by one specific qualification—it applies only if you pleaded not guilty and were subsequently found guilty.<sup>116</sup> Second, the Louisiana Code provides that “[d]isciplinary board hearings must be recorded in their entirety and the recording preserved for five years.”<sup>117</sup> These recordings provide a concrete record of the exact testimony provided in High Court, which can either help or harm your appeal.<sup>118</sup> If you plan to appeal the decision of the High Court, it is important you request this recording be preserved for that appeal and keep a record of this request; if the prison officials fail to preserve the recording, you may have grounds for a new hearing.<sup>119</sup>

A prisoner’s right to several levels of review is also important in appealing High Court decisions. The first level of review begins with an appeal to the warden. The next level involves an appeal to the Secretary. A final level of review is available in state or federal court. In addition to each of these measures, prisoners are always at liberty to file a Corrections Administrative Remedy Procedure Report (*see* Chapter 9 of the *Louisiana State Supplement*, “Inmate Grievance Procedures”).

### a. Appeal to the Warden

An offender may appeal a case heard by the disciplinary board (high court). All appeal requests on high court cases shall be to the warden.<sup>120</sup> You may appeal directly, or through the aid of a Counsel

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Rules and Procedures for Adult Offenders 18 (2008), *available at* <https://www.law.umich.edu/special/polyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017) (same).

<sup>114</sup> LA. ADMIN. CODE tit. 22, § 341J(8) (2017); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 11 (2008), *available at* <https://www.law.umich.edu/special/polyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017).

<sup>115</sup> LA. ADMIN. CODE tit. 22, § 341J(8) (2017) (noting prisoners have “the right to a written summary of the evidence and reasons for the judgment,” and that the “convicted offender shall be given or sent a written summary”); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 11 (2008), *available at* <https://www.law.umich.edu/special/polyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017) (same).

<sup>116</sup> LA. ADMIN. CODE tit. 22, § 341J(8) (2017) (noting that the right to be given a written summary is provided “when the accused entered a plea of ‘not guilty’ and was found ‘guilty’ by the disciplinary board”); La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 11 (2008), *available at* <https://www.law.umich.edu/special/polyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017) (same).

<sup>117</sup> LA. ADMIN. CODE tit. 22, § 341G(4)(c) (2017). The *Offender Rulebook* states something differently: that, while recorded in their entirety, hearings should be “preserved in accordance with the Department’s record retention policy for use in any subsequent judicial review or any other court proceedings.” *See* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 12 (2008), *available at* <https://www.law.umich.edu/special/polyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017).

<sup>118</sup> *See Ford v. Dep’t. of Corr.*, 2009-0103, p. 1 (La. App. 1 Cir. 5/8/09); 2009 WL 1272349, at \*1 (unpublished) (affirming “somewhat harsh” penalties imposed on a prisoner for derogatory comments made toward a corrections officer because a “review of the record does indicate the petitioner entered a [guilty] plea as reflected by the record”).

<sup>119</sup> *See Hills v. Cain*, 1999-2324, p. 3 (La. App. 1 Cir. 3/31/00); 764 So. 2d 1048, 1050 (holding that an inmate’s right to judicial review was violated and a retrial was required when prison officials destroyed a tape recording of a prisoner’s appeal to the Secretary in spite of the prison’s “knowledge of an ongoing judicial review” with regard to the inmate’s case).

<sup>120</sup> LA. ADMIN. CODE tit. 22, § 341H(1)(b)(i) (2017); *see also* La. Dep’t. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 18 (2008), *available at* [https://www.law.umich.edu/special/polyclearinghouse/Documents/LA%20B-05-](https://www.law.umich.edu/special/polyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf)

Substitute, but in any case, the appeal must be received by the warden within fifteen days of the High Court Hearing.<sup>121</sup> The appeal should be presented using Form AF-1, which is available from your classification officer. If no such forms are available, you are permitted to use a blank sheet of paper so long as the paper contains all the same information as Form AF-1 (*see* footnote below).<sup>122</sup> The warden will decide on the appeal within thirty days of receiving the appeal.<sup>123</sup> You will be notified of the result in writing.<sup>124</sup> If additional time is required, the warden must notify you of his need for an extension.<sup>125</sup>

In addition, the warden has the right to return the appeal to a prisoner or Substitute Counsel where the warden deems the appeal too long or that the appeal is missing information.<sup>126</sup> Prisoners will have five days to comply with the Warden's instructions and return the corrected appeal.<sup>127</sup> If you do not return the corrected appeal within five days, then the remedies allowed to you from inside have not yet been exhausted, which means you are not permitted to appeal this case further to either the Secretary or to a state (*see* Section F(2)(c), *Filing in State Court*, below) or federal court (*see* Section F(2)(d), *Filing in Federal Court*, below).

#### b. Appeal to the Secretary

You must appeal a warden's decision *within five days* of receiving the warden's Appeal Decision (Form AF-2). To appeal this decision, simply check the box on Form AF-2 indicating "not satisfied," date and sign the form, and submit it to either your ARP screening officer,<sup>128</sup> or, in some cases, depending on the

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001%20Offender%20Rule%20Book%20OCR.pdf (last visited Sept. 6, 2017) ("An offender who wants to appeal a case heard by the Disciplinary Board (High Court) must, in all cases, appeal to the Warden.").

<sup>121</sup> LA. ADMIN. CODE tit. 22, § 341H(1)(b)(ii) (2017); La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 18 (2008), *available at*

<https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017).

<sup>122</sup> LA. ADMIN. CODE tit. 22, § 341H(1)(b)(iii) (2017); La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 18 (2008), *available at*

<https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017). An AF-1 form requires the following information: your name, the name of your counsel (if any), the original charge, the charge you were found guilty of, state whether sentence was imposed, what sentence you received, the date of the disciplinary report, the date of your disciplinary hearing, the location of the hearing, members of the board present, and whether you pleaded guilty or not guilty. In addition, you must write down what are the *issues* you want to dispute or argue on appeal, then provide the *arguments* in support of your appeal, and state the *relief* you desire. Finally, your signature is required. As mentioned before, you are recommended to either make a copy of the AF-1 form you submit, or handwrite a second copy for your records.

<sup>123</sup> LA. ADMIN. CODE tit. 22, § 341H(1)(b)(iv) (2017); La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 18 (2008), *available at*

<https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017).

<sup>124</sup> LA. ADMIN. CODE tit. 22, § 341H(1)(b)(iv) (2017); La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 18 (2008), *available at*

<https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017).

<sup>125</sup> LA. ADMIN. CODE tit. 22, § 341H(1)(b)(iv) (2017); La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 18 (2008), *available at*

<https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017).

<sup>126</sup> LA. ADMIN. CODE tit. 22, § 341H(1)(b)(v) (2017) ("It is necessary for the offender to only provide basic factual information regarding his case. Lengthy appeals will be returned to the offender for summarization."); La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 18 (2008), *available at*

<https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017) (stating this in similar terms).

<sup>127</sup> LA. ADMIN. CODE tit. 22, § 341H(1)(b)(v) (2017) ("The offender will have five calendar days from receipt to comply with the instructions and resubmit."); La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 18 (2008), *available at* <https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017).

<sup>128</sup> ARP screening officers may also be known as Administrative Remedy Procedure Screening Officers.

procedures of your specific unit, the warden's office.<sup>129</sup> No additional materials will be accepted, as the original appeal to the warden will get added to your file prior to review by the Secretary.<sup>130</sup>

Not all decisions are subject to appeal by the Secretary: "The [S]ecretary shall only consider appeals of sanctions from decisions of the warden that resulted in an imposed or suspended sentence of one or more of the following penalties: (a) forfeiture of good time; (b) a custody change from minimum to medium if it involves transfer to another institution; (c) a custody change to maximum; (d) failure to earn incentive wages."<sup>131</sup> Appeals against orders of restitution, imposed in accordance with Department Regulation No. B-05-003, will also be considered.<sup>132</sup> And "[a]bsent unusual circumstances, the [S]ecretary will only consider review of the sanction(s) imposed on an offender who pled guilty," meaning the Secretary will consider changing the sanction (sentence) imposed on those who pleaded guilty but will not reverse their original guilty plea.<sup>133</sup>

All appeals will be decided within eighty-five days of receipt of the appeal, unless there are unusual circumstances.<sup>134</sup> Prisoners will be notified promptly in writing of the result.<sup>135</sup> If a decision is not delivered within eighty-five days, this does not necessarily mean that you can further appeal.

### c. Filing in State Court

If you fail to secure relief by appealing to the warden or Secretary, you can file a claim in state court.<sup>136</sup> Your right of access to state court is governed by the Louisiana Prison Litigation Reform Act (Louisiana PLRA).<sup>137</sup> The Louisiana PLRA—not to be confused with the federal PLRA which governs suits

<sup>129</sup> LA. ADMIN. CODE tit. 22, §§ 341H(1)(c)(i)–(ii) (2017); La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 18 (2008), *available at* <https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017).

<sup>130</sup> LA. ADMIN. CODE tit. 22, § 341H(1)(c)(vi) (2017); La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 19 (2008), *available at* <https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017).

<sup>131</sup> LA. ADMIN. CODE tit. 22, §§ 341H(1)(c)(vii)(a)–(d) (2017). The *Offender Rulebook* provides that the Secretary may also hear appeals from the penalty of "Disciplinary Detention," but this is not indicated in the Louisiana Code. *See* La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 19 (2008), *available at* <https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017).

<sup>132</sup> LA. ADMIN. CODE tit. 22, § 341H(1)(c)(viii) (2017); La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 19 (2008), *available at* <https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017).

<sup>133</sup> LA. ADMIN. CODE tit. 22, § 341H(1)(c)(ix) (2017); La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 19 (2008), *available at* <https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017).

<sup>134</sup> LA. ADMIN. CODE tit. 22, § 341H(1)(c)(ix) (2017); La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 19 (2008), *available at* <https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017).

<sup>135</sup> LA. ADMIN. CODE tit. 22, § 341H(1)(c)(ix) (2017); La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 19 (2008), *available at* <https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Sept. 6, 2017).

<sup>136</sup> LA. REV. STAT. ANN. § 15:1177 (2017) (stating that "[a]ny offender who is aggrieved by an adverse decision, excluding decisions related to delictual actions for injury or damages, by the Department of Public Safety and Corrections . . . rendered pursuant to any administrative remedy procedures under this Part may, within thirty days after the receipt of the decision, seek judicial review of the decision only in the Nineteenth Judicial District Court or, if the offender is in the physical custody of the sheriff, in the district court having jurisdiction in the parish in which the sheriff is located").

<sup>137</sup> *See generally* LA. REV. STAT. ANN. §§ 15:1181–15:1191 (2017) (governing prisoner suits).

by prisoners raised in federal courts<sup>138</sup>—really regulates and limits the types of law suits a prisoner can bring in state court. For example, it limits the types of injuries you can sue for<sup>139</sup> or the venue (location) where you can file a suit.<sup>140</sup> It is strongly recommended you review the Louisiana PLRA prior to submitting a claim in state court, especially Section 1184, “Suits by Prisoners.” You are also recommended to review the Louisiana Corrections Administrative Remedy Procedure (Louisiana CARP), which likewise regulates the types of claims you can bring in state court.<sup>141</sup>

### i. *Exhaustion*

Both the Louisiana PLRA and CARP create filters which prevent a number of claims from making it to state courts. One of the most important filters is the “exhaustion requirement,” which requires that you fully exhaust all the administrative remedies (remedies available within the prison system) available to you before making a claim in state court.<sup>142</sup> Failure to satisfy this exhaustion requirement will result in the state court dismissing your appeal for lack of subject matter jurisdiction (meaning the court does not have the right or power to review your claim).<sup>143</sup> If you skip certain administrative remedies due to a lack of response by the prison authorities—such as failing to return an amended appeal to the Department of Public Safety and Corrections (DPSC) Secretary upon their request—the court will find you failed to exhaust all the administrative remedies available.<sup>144</sup> Likewise, if you skip certain administrative remedies due to your subjective (personal) belief that they will prove inadequate or are pointless, the court will find you failed to exhaust all the administrative remedies available. In both cases, the state court will not have subject matter jurisdiction and will not be able to hear your case.

### ii. *Substantial Rights*

Even if you have exhausted all your administrative remedies, the Louisiana CARP further filters out the types of cases a court may review.<sup>145</sup> Specifically, the Louisiana CARP permits state courts to review or modify decisions only if *substantial rights* of the appellant have been prejudiced.<sup>146</sup> Section 15:1177A(9)(a)–(f) of the Louisiana State Revised Statutes states that “substantial rights” are implicated only if the appealed decisions might:

- 1) Violate constitutional or statutory provisions (legal rights protected by laws);
- 2) Be in excess of the statutory authority of the administering agency (meaning the board from the High Court Hearing did more than it was permitted to do);
- 3) Be based on unlawful procedure;

<sup>138</sup> See Chapter 14 of the main *JLM*, “The Prison Litigation Reform Act.”

<sup>139</sup> LA. REV. STAT. ANN. § 15:1184E (2017) (“No prisoner suit may assert a claim under state law for mental or emotional injury suffered while in custody without a prior showing of physical injury.”).

<sup>140</sup> LA. REV. STAT. ANN. § 15:1184F (2017) (“The exclusive venue for delictual actions for injury or damages shall be the parish where the prison is situated to which the prisoner was assigned when the cause of action arose. Upon consent of all parties, the court may transfer the suit to a parish in which venue would otherwise be proper.”).

<sup>141</sup> See *generally* LA. REV. STAT. ANN. §§ 15:1171–15:1179 (2017) (covering administrative remedy procedure).

<sup>142</sup> LA. REV. STAT. ANN. § 15:1184A(2) (2017); *see also* Walker v. La. Dep’t. of Corr., 2010-0057, p. 4 (La. App. 1 Cir. 6/11/10); 40 So. 3d 1238, 1241 (holding that the prisoner was not permitted to appeal in state or federal court on his claim for reinstatement of “good time credits” as the prisoner had failed to exhaust all administrative remedies available in the prison system).

<sup>143</sup> Harrell v. Dep’t. of Pub. Safety & Corr., 2009-1421, p. 1 (La. App. 1 Cir. 2/12/10); 2010 WL 528475, at \*1 (unpublished) (holding that the plaintiff prisoner, Harrell, had not exhausted all the administrative remedies available, and thus the district court lacked subject matter over the claim); *see also* Hull v. Stalder, 2000-2730, p. 3 (La. App. 1 Cir. 2/15/02); 808 So. 2d 829, 831 (holding that “the commissioner and the trial court did not have jurisdiction over Hull’s claim because he failed to exhaust administrative remedies available to him”).

<sup>144</sup> Moreau v. La. Dep’t. of Pub. Safety & Corr., 2007-1430, p. 3 (La. App. 1 Cir. 2/8/08); 2008 WL 426477, at \*3 (unpublished) (holding that prisoner failed to exhaust administrative remedies when he decided not to submit an appeal to the Secretary of his institution as a result of the warden’s failure to respond to his earlier appeal).

<sup>145</sup> See LA. REV. STAT. ANN. § 15:1177 (2017), which includes a comprehensive list of limitations including requirements to: (1) file such appeals within thirty days of receiving the decision you seek to appeal, (2) file in a particular court—the Nineteenth Judicial District Court (with some exceptions), and (3) file against one party only, the Department of Public Safety and Corrections.

<sup>146</sup> LA. REV. STAT. ANN. § 15:1177A(9) (2017).

- 4) Be affected by another error of law;
- 5) Be arbitrary (random or illogical) or capricious (impulsive or unpredictable) or characterized by an abuse of discretion (meaning the board from the High Court Hearing acted in violation of “good faith”); or
- 6) Be “[m]anifestly erroneous in view of the reliable, probative and substantial evidence on the whole record” (meaning the evidence presented could not have supported the final decision of the board in the High Court Hearing).<sup>147</sup>

In spite of this comprehensive definition provided above, there are contradictions in what courts have deemed “substantial rights.”<sup>148</sup> However, in general, most claims brought in state court are found insufficient in meeting this standard.<sup>149</sup>

### iii. *Objections Not Raised at High Court Hearing*

There are two additional reasons why a court may filter out your claim. First, a court may reject your claim if it involves review on the basis of objections or motions that were not originally raised in your prior appeals.<sup>150</sup> At the beginning of each High Court Hearing, immediately after the Disciplinary Report is read aloud to you and you are asked to submit a plea, you must raise all possible motions that may affect your case (*see* Part C in this Chapter). If you do not raise these motions at this time, you will not be permitted to raise them later. Second, a court will refuse to hear cases involving issues which are not ripe for review; this means that the issues to be decided must not be moot (already resolved) and the remedy you seek must have some potential use.<sup>151</sup>

### iv. *Malicious Claims and “Three Strikes”*

If your claim passes these filters, you must also decide if you think your claim has sufficient merit or legal basis. The right to appeal is not unqualified or without peril. If prison officials determine you filed an appeal in state court that is malicious (meaning mean spirited or hurtful) in nature then this may be

<sup>147</sup> LA. REV. STAT. ANN. §§ 15:1177A(9)(a)–(f) (2017).

<sup>148</sup> *See generally* Williams v. Dep’t. of Pub. Safety & Corr., 2010-2301, p. 1 (La. App. 1 Cir. 6/10/11); 2011 WL 2981196, at \*1 (unpublished) (holding that a change in custody status does not infringe upon a “substantial right”); Perryman v. LeBlanc, 2010-1649, p. 1 (La. App. 1 Cir. 3/25/11); 2011 WL 1104110, at \*1 (unpublished) (holding that penalties must involve “atypical and substantial hardship” and represent a “dramatic departure from the basic conditions of [his] . . . sentence”) (quoting Sandin v. Conner, 515 U.S. 472, 484–485, 115 S. Ct. 2293, 2300–2301, 132 L.Ed.2d 418 (1995)); Mars v. La. Dept. of Pub. Safety & Corr., 2010-1617, p. 1 (La. App. 1 Cir. 3/25/11); 2011 WL 1103342, at \*1 (unpublished) (holding that changes in housing or job classification do not infringe upon a “substantial right” under any circumstance). *But see* Orange v. Radar, 2009-1576, p. 2 (La. App. 1 Cir. 5/26/10); 2010 WL 2109829, at \*2 (unpublished) (holding that prisoners who were erroneously charged with Schedule B offenses when they should have been charged with Schedule A offenses may suffer loss of a “substantial right”).

<sup>149</sup> Cases are routinely dismissed because the decision did not impact a “substantial right” of the appealing prisoner. *See generally* Foster v. La. Dep’t. of Pub. Safety & Corr., 2006-0159, p. 1 (La. App. 1 Cir. 12/28/06); 2006 WL 3813717, at \*1 (unpublished) (dismissing the suit because the court ruled the imposition of a penalty of eight days extra duty did not constitute the loss of a “substantial right”); Taylor v. Stalder, 2006-0066, p. 1 (La. App. 1 Cir. 11/3/06); 2006 WL 3110287, at \*1 (unpublished) (holding that the imposition of twenty-eight days of cell confinement and a custody change is “not unusual or a significant hardship in relation to the ordinary incidents of prison life and did not prejudice Taylor’s substantial rights,” and “[t]hus, modification or reversal of the disciplinary action by the DPSC was not warranted under the law”).

<sup>150</sup> Orange v. Stewart, 2008-1966, pp. 3–4 (La. App. 1 Cir. 3/27/09); 2009 WL 839041, at \*3–4 (unpublished) (dismissing the prisoner’s claim that his substantial rights were impacted because he was not permitted to call witnesses on the basis that the prisoner failed to raise this claim at any time during the previous administrative hearings).

<sup>151</sup> *See generally* Alex v. Acklin, 2010-1889, p. 1 (La. App. 1 Cir. 5/6/11); 2011 WL 2112750, at \*1 (unpublished) (dismissing the prisoner’s claim because the remedy sought no longer served any “useful purpose” nor would provide any “practical relief or effect” and was thus rendered moot); Hanna v. La. Dep’t. of Pub. Safety & Corr., 2006-0444, p. 1 (La. App. 1 Cir. 2/14/07); 2007 WL 466750, at \*1 (unpublished) (dismissing a prisoner’s claim to reinstate 180 days of good time credit when the prisoner was already released on probation, thus making his claim moot as it “involved a disciplinary decision that, even if reversed, would have no consequences”).



grounds for additional disciplinary actions.<sup>152</sup> For example, if you file an appeal that unnecessarily injures the reputation of a prison officer by use of harmful or derogatory (offensive) language, then the prison officials may be permitted to charge you with a Schedule A violation for disrespect<sup>153</sup> or a Schedule B violation for defiance.<sup>154</sup> Also, if the screening commission determines your appeal is malicious or frivolous (trivial or unnecessary), it may activate certain legal repercussions under Louisiana CARP.<sup>155</sup> For example, pursuant to Section 15:1187 of the Louisiana State Revised Statutes, the screening commission (or court) may prevent you from bringing suit if your appeal in state court has been dismissed as frivolous or malicious on three or more prior occasions.<sup>156</sup> The “three strikes” rule prevents any prisoner with three strikes—indicating he had three prior cases dismissed for being either frivolous or malicious—to make any future appeal in state court.<sup>157</sup> The only exception to the “three strikes” rule is if you are “under imminent danger or serious physical injury.”<sup>158</sup> Lastly, even if your case is finally heard by a District Court, you will likely be held responsible for paying all your own legal costs if you lose the case, regardless of whether or not your claim was malicious or frivolous in nature.<sup>159</sup>

### v. *State Court Procedures*

If you determine your claim will not be filtered out for any of the reasons stated above, and you are prepared to face the consequences if your case is either dismissed or deemed to be frivolous or malicious in nature, you are encouraged to seek an appeal in state court. To submit an appeal to state court you must file a Petition for Judicial Review in the Nineteenth Judicial District Court within thirty days of receiving

<sup>152</sup> See *Robichaux v. Tanner*, 995 F.2d 223, 225 (5th Cir. June 11, 1993); 1993 WL 210421, at \*2 (per curiam). In *Robichaux*, a prisoner sought relief through a prison administrative remedy procedure. In his claim for relief he used derogatory terms to describe a prison officer. Prison officials cited him for a violation of Rule 7 (Disrespect), and the prisoner sued claiming prison officials had retaliated in response to his legal right to seek remedy. The court held that while the prisoner is permitted to pursue legal remedies, he may not do so in such a manner that would otherwise constitute a violation of prison rules.

<sup>153</sup> LA. ADMIN. CODE tit. 22, § 341I (Rule 7) (2017); La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 21 (2008), available at <https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Oct. 11, 2017).

<sup>154</sup> LA. ADMIN. CODE tit. 22, § 341I (Rule 3) (2017); La. Dep't. of Pub. Safety & Corr., Disciplinary Rules and Procedures for Adult Offenders 20–21 (2008), available at <https://www.law.umich.edu/special/policyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Oct. 11, 2017).

<sup>155</sup> Pursuant to § 15:1184 of the Louisiana State Revised Statutes, if the screening committee for a state or federal court finds a prisoner's appeal is frivolous or malicious, or fails to state a cause of action, a “legal strike” is placed against the prisoner's record. LA. REV. STAT. ANN. § 15:1184B (2017) (“The court, on its own motion or on the motion of a party, shall dismiss any prisoner suit if the court is satisfied that the action is frivolous, is malicious, fails to state a cause of action . . . or fails to state a claim upon which relief can be granted.”).

<sup>156</sup> LA. REV. STAT. ANN. § 15:1187 (2017) (“In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding . . . if the prisoner has, on three or more prior occasions while incarcerated or detained in any facility, brought an action or appeal in a state court that was dismissed on the grounds that it was frivolous, was malicious, failed to state a cause of action, or failed to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.”). See generally *Rushing v. Goodwin*, 2010-1482, pp. 1–2 (La. App. 1 Cir. 2/11/11); 2011 WL 856915, at \*1–2 (unpublished) (reaffirming the district court's ruling that the prisoner should be assessed a “strike” for failing to state a cause of action in his appeal); *Harris v. Cain*, 2010-1474, p. 1–2 (La. App. 1 Cir. 2/11/11); 2011 WL 846078, at \*1–2 (unpublished) (upholding a legal “strike” against the appealing prisoner because he failed to state a claim that implicated “substantial rights” and was thus found in violation of LA. REV. STAT. ANN. § 15:1187 (2011) for filing a frivolous claim); *Thomas v. Cain*, 2008-0462, pp. 1–2 (La. App. 1 Cir. 9/19/08); 2008 WL 4287549, at \*1–2 (unpublished) (upholding the district court's decision to impose the penalty of a “strike” against the prisoner for failure to raise a violation impacting a “substantial right”).

<sup>157</sup> See *Peterson v. Gildon*, 40,328, p. 2 (La. App. 2 Cir. 12/30/05); 917 So. 2d 1284, 1286 (holding that prisoner was not permitted to bring legal appeal because he had “three strikes” against him, representing three prior dismissals of actions brought by the prisoner which were dismissed on the grounds that they were frivolous, malicious, or failed to state a cause of action).

<sup>158</sup> LA. REV. STAT. ANN. § 15:1187 (2017).

<sup>159</sup> See, e.g., *Boatner v. La. Dep't. of Corr.*, 2010-0994, p. 1 (La. App. 1 Cir. 12/22/10); 2010 WL 5479685, at \*1 (unpublished) (finding the prisoner liable for all costs of his losing appeal even though his claim was neither frivolous nor malicious in nature).

notice of the decision you are appealing.<sup>160</sup> Your petition must list the “Department of Public Safety and Corrections” as the party defendant.<sup>161</sup> If you wish the court to consider whether you can make an oral argument to the court, you must make this request in your original petition.<sup>162</sup>

Your petition will be first reviewed by the court where you filed your appeal to determine if you have a “cognizable claim,” meaning they will determine if your claim has merit (a chance to succeed).<sup>163</sup> The court will then perform a second screening review to determine if you state a cognizable claim, or if your petition fails to state a cause of action.<sup>164</sup> If the court rejects your right to appeal, it is not required to contact the Department of Public Safety and Corrections to alert them to your attempt to appeal.<sup>165</sup> If the court accepts your petition, then the Department of Public Safety and Corrections *must* be notified, and it will likely file a response to your claim in return.

The court will then review your claim. The standard of review in such cases favors the Department of Public Safety and Corrections:

[T]he issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the fact finder’s conclusion was a reasonable one. Even though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinder’s, . . . reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony.<sup>166</sup>

This standard of review suggests the state court will not retry your case but will only review your case to see if the decision reached by the original administrative body was unreasonable considering all the relevant facts. Only in cases where the decision is “clearly wrong or manifestly erroneous” should the court reverse or modify a prior decision.<sup>167</sup> In light of this high standard, many claims are unsuccessful. To overcome this hurdle, you need compelling support that relief should be granted in your case. If other cases decided by the court support your claim, then you should identify this precedent (rule or principle established by a prior court of law) to the judge, but you should note that Louisiana is unique in the United States in that judges are not required to accept precedent, though they often do.<sup>168</sup>

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<sup>160</sup> LA. REV. STAT. ANN. § 15:1177A(1)(a) (2014). This statute is strictly interpreted to mean thirty days. *See Stemley v. Henderson*, 2007-0181, p. 1 (La. App. 1 Cir. 11/2/07); 2007 WL 3227665, at \*1 (unpublished) (holding that the prisoner’s claim must be dismissed for failure to submit it within the required thirty-day time limit, providing no allowance for holidays, weekends, or other circumstances).

<sup>161</sup> LA. REV. STAT. ANN. § 15:1177A(1)(b) (2017).

<sup>162</sup> LA. REV. STAT. ANN. §§ 15:1177A(6)(a)–(b) (2017).

<sup>163</sup> LA. REV. STAT. ANN. § 15:1188A (2017).

<sup>164</sup> LA. REV. STAT. ANN. §§ 15:1178 B–D (2017).

<sup>165</sup> *Gallow v. Stalder*, 2008-0944, p. 1 (La. App. 1 Cir. 12/23/08); 2008 WL 5377807, at \*1 (unpublished) (holding that the prisoner’s claim did not involve a substantial right and would not be heard, thus permitting the screening commission to dismiss the claim and not provide notification to the Department of Public Safety and Corrections).

<sup>166</sup> *Nettleton v. Audubon Ins. Co.*, 93-1576 (La. App. 1 Cir. 5/20/94); 637 So. 2d 792, 794 (quoting *Stobart v. State*, 617 So. 2d 880, 882–883 (La. 1993)) (affirming that the appropriate standard of review is to look to whether the original administrative body could have reasonably reached the conclusion they finally decided upon, not whether the current court believes the facts of the case suggest the original administrative body should have decided differently).

<sup>167</sup> *Walters v. Dep’t. of Police of the City of New Orleans*, 454 So. 2d 106, 114 (La. 1984) (holding that administrative decisions may only be modified or reversed upon finding of substantial error).

<sup>168</sup> Forty-nine state courts follow the common-law principle of *stare decisis*, which means that judges are bound by, and must apply, the interpretation of laws as articulated in older cases. Louisiana is unique because its state courts follow a civil law principle in which judges are not bound by former interpretations of the law. Instead, each judge in Louisiana must make his or her own interpretation of the law. *See* LA. CIV. CODE. ANN. art. 1(c) (2017) (“In Louisiana, as in other civil law jurisdictions, legislation is superior to any other source of law. Article 1 of the Louisiana Civil Code of 1870 (Article 2 of this project), declaring that legislation is a formal expression of legislative will, has been interpreted to establish the supremacy of legislation and to exclude judicial legislation.”).

Should the Nineteenth Judicial District Court dismiss your claim, you can exercise one final state administrative remedy—appeal the decision of the District Court to the Louisiana Court of Appeals within thirty days of receiving the adverse decision.<sup>169</sup>

d. Filing in Federal Court

If you fail to obtain relief through the prison grievance system or the state court system, your final option for relief lies in federal court. To obtain relief in federal court, you must file a claim under 42 U.S.C. § 1983,<sup>170</sup> 28 U.S.C. § 1331,<sup>171</sup> 28 U.S.C. § 2254,<sup>172</sup> 28 U.S.C. § 2241<sup>173</sup> and 28 U.S.C. § 2255.<sup>174</sup> For more information on the type of claims you may make in federal court, *see* Chapter 13 of the main *JLM*, “Federal Habeas Corpus,” Chapter 14 of the main *JLM*, “The Prison Litigation Reform Act,” Chapter 15 of the main *JLM*, “Inmate Grievance Procedures,” Chapter 16 of the main *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law,” and Chapter 18 of the main *JLM*, “Your Rights at Prison Disciplinary Proceedings.”

In all cases, the federal courts will not hear your case unless you have exhausted all the remedies in your state, including an appeal to the warden and then to the Secretary, filing a Corrections Administrative Remedy Procedure Report, submitting a Petition for Judicial Review in the Nineteenth Judicial District Court, and appealing any adverse decision in the Nineteenth Judicial District Court to the Louisiana Court of Appeals.<sup>175</sup>

## G. CONCLUSION

Prison officials are granted broad authority to give sanctions upon prisoners, but this authority does not go unchecked. Prisoners are afforded a number of rights which serve to protect them from unnecessary or erroneous disciplinary measures—most important of these rights is your right to appeal disciplinary decisions you believe to have been made in error. But many of these rights are contingent upon your ability to follow very specific procedures, such as submitting documents within a certain time period, raising objections and motions at a specific stage of the process, or submitting requests to the proper authorities. In this way, you can only secure the rights which protect you by knowing and following the procedures required by the disciplinary system. You can master these procedures by reviewing the *Offender Rulebook*, or consulting with a Substitute Counsel. And if you master these procedures, then you will secure valuable rights which should help protect you from arbitrary and unjust disciplinary decisions in the future.

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<sup>169</sup> LA. REV. STAT. ANN. § 15:1177A(10) (2017) (“An aggrieved party may appeal a final judgment of the district court to the appropriate court of appeal.”).

<sup>170</sup> State prisoners should bring a claim in federal court under 42 U.S.C. § 1983 (2012) if you believe your prison has violated constitutional or federal statutory or legal rights. *See* Chapter 16 of the main *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law.”

<sup>171</sup> Federal prisoners should bring a claim in federal court under 28 U.S.C. § 1983 (2012) if you believe your prison has violated constitutional or federal statutory or legal rights. *See* Chapter 16 of the main *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law.”

<sup>172</sup> State prisoners should bring a claim in federal court under 28 U.S.C. § 2254 (2012) if you wish to make a habeas corpus claim against your state prison. *See* Chapter 13 of the main *JLM*, “Federal Habeas Corpus.”

<sup>173</sup> 28 U.S.C. § 2241 (2012) provides federal prisoners with a limited range of options to sue a federal prison on a claim of habeas corpus. *See* Chapter 13 of the main *JLM*, “Federal Habeas Corpus.”

<sup>174</sup> 28 U.S.C. § 2255 (2012) provides federal prisoners with a broad range of options to sue a federal prison on a claim of habeas corpus. *See* Chapter 13 of the main *JLM*, “Federal Habeas Corpus.”

<sup>175</sup> *See* Chapter 15 of the main *JLM*, “Inmate Grievance Procedures.”

## CHAPTER 12: SECURITY CLASSIFICATIONS

### A. INTRODUCTION

After you get to prison in Louisiana, you will be screened and assigned a security classification. Your security classification, or custody level, will decide where you live, who you can live with, how much supervision you will receive, and work assignments. In addition, there are special kinds of classifications, including protective custody and administrative segregation.

This Chapter summarizes how prisoners are classified in Louisiana and how those classifications can be challenged. Part B explains classification and custody levels. Part C describes the legal and administrative options you have to challenge classification decisions.

This Chapter focuses on the classification system in Louisiana state facilities. Although Chapter 31 of the main *JLM*, “Security Classification and Gang Validation,” also discusses prisoner classification, that chapter is about the *federal* prison system. If you are a Louisiana state prisoner, you should rely on this Chapter. In addition, this Chapter will point out when sections of the main *JLM* may help you.

### B. GENERAL SECURITY CLASSIFICATION AND CUSTODY LEVELS

After you enter prison in Louisiana, you will be screened and assigned a security classification. This classification will be done according to impartial written procedures.<sup>1</sup> No matter your classification, you must be informed of the reasons for it.<sup>2</sup> Section 1 discusses custody levels. Section 2 discusses initial classification. Section 3 explains administrative options to appeal your classification. Section 4 provides an overview of constitutional options to appeal your classification.

Prison officials have lots of discretion to assign classifications as they see fit. As will be explained in Part C of this chapter, courts are reluctant to interfere with classification decisions.<sup>3</sup> Because of this, you should pay special attention to the administrative options available to you.

#### 1. Custody Levels

In Louisiana prisons, you will be assigned a custody level. This level will decide your type of housing, how much freedom you have to move around the facilities, and what kind of restraints are required when moving you.<sup>4</sup> There are three primary custody levels:<sup>5</sup>

*Maximum Custody:* The classification of maximum custody is assigned when there is a need to protect the prisoner, other prisoners, prison staff, the prison itself, or the public. You may be given a maximum custody classification during the intake process. You may also be assigned a maximum custody level if you are temporarily assigned to administrative segregation, disciplinary detention, maximum custody dormitories, working cellblocks, or protective custody. If you are assigned the maximum custody level, you will be very closely

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<sup>1</sup> LA. ADMIN CODE tit. 22, pt. III § 3303(A) (2017).

<sup>2</sup> LA. ADMIN CODE tit. 22, pt. III § 3303(A) (2017).

<sup>3</sup> *Sandin v. Conner*, 515 U.S. 472, 482, 115 S. Ct. 2293, 2299, 132 L. Ed. 2d 418, 429 (1995) (“[F]ederal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment.”) (citations omitted).

<sup>4</sup> Dep’t. of Pub. Safety and Corr., *Inside the System: How Inmates Live and Work 14* (2009), *available at* [https://www.webcitation.org/6Bdg2h6fj?url=http://www.corrections.state.la.us/Wordpress/wp-content/uploads/2009/10/Time\\_in\\_Prison11.pdf](https://www.webcitation.org/6Bdg2h6fj?url=http://www.corrections.state.la.us/Wordpress/wp-content/uploads/2009/10/Time_in_Prison11.pdf) (last visited Feb. 25, 2018).

<sup>5</sup> Dep’t. of Pub. Safety and Corr., *Inside the System: How Inmates Live and Work 14* (2009), *available at* [https://www.webcitation.org/6Bdg2h6fj?url=http://www.corrections.state.la.us/Wordpress/wp-content/uploads/2009/10/Time\\_in\\_Prison11.pdf](https://www.webcitation.org/6Bdg2h6fj?url=http://www.corrections.state.la.us/Wordpress/wp-content/uploads/2009/10/Time_in_Prison11.pdf) (last visited Feb. 25, 2018).

supervised. Movement inside the prison may include the use of restraints. Outside the prison your movement will be restrained and/or supervised by an armed officer.<sup>6</sup>

*Medium Custody:* A classification of medium custody means you will be assigned to a general population dormitory. Your movement outside the prison will be supervised by an armed officer and/or require restraints.<sup>7</sup>

*Minimum Custody:* A classification of minimum custody means you will be assigned to a general population dormitory. Your movement outside the prison does not require armed supervision and/or restraint, though they may be used.<sup>8</sup>

Most prisons in Louisiana can house prisoners of each custody level.<sup>9</sup> In Louisiana, the classification process concerns more than just your custody level. It also determines the facility you are placed in and work assignments.

## 2. Initial Classification

After you enter prison, you will go through intake and an initial classification process. This process will decide which facility you are sent to and an initial custody level. Prison officials are required to complete your initial classification process within 48 hours after you are admitted into their custody,<sup>10</sup> and the entire process should be completed within 72 hours.<sup>11</sup> Although the initial classification process is completed within 72 hours, you may still have to remain in intake until a space opens up for you at your assigned prison.<sup>12</sup> Your orientation, where officials provide written and verbal information, should occur within seven days of your arrival, unless the institution that finds medical or behavioral problems prevent this process.<sup>13</sup> You should receive the information in your own language or translated into your language.<sup>14</sup> During this time, you should be able to access basic services such as the telephone, visitation, mail privileges, legal materials, religious services, medical and mental health services, exercise, and grievance procedures (a process to make a complaint).<sup>15</sup> However, the full intake process can take weeks.<sup>16</sup> If you are placed on death row, however, you are transferred immediately to Louisiana State Penitentiary in Angola.<sup>17</sup>

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<sup>6</sup> Dep't. of Pub. Safety and Corr., Disciplinary Rules and Procedures for Adult Offenders (2008), at 5, *available at* <https://www.law.umich.edu/special/polyclearinghouse/Documents/LA%20B-05-001%20Offender%20Rule%20Book%20OCR.pdf> (last visited Feb. 26, 2018).

<sup>7</sup> Dep't. of Pub. Safety and Corr., Department Regulation No. B-02-019, Custody Levels (2013), at 8. This regulation and the rest of the regulations cited in this chapter are not available online. To obtain a copy, you can request a copy from the Legal Affairs department of the Louisiana Department of Corrections. However, you may need to file a Public Records request in order to obtain the regulations. The process for filing a Louisiana Public Records request is explained in Chapter 1, Part C, "Your Right to Information," of this Supplement.

<sup>8</sup> Dep't. of Pub. Safety and Corr., Department Regulation No. B-02-019, Custody Levels (2013), at 8.

<sup>9</sup> Dep't. of Pub. Safety and Corr., Inside the System: How Inmates Live and Work (2009), at 14, *available at* [https://www.webcitation.org/6Bdg2h6fj?url=http://www.corrections.state.la.us/Wordpress/wp-content/uploads/2009/10/Time\\_in\\_Prison11.pdf](https://www.webcitation.org/6Bdg2h6fj?url=http://www.corrections.state.la.us/Wordpress/wp-content/uploads/2009/10/Time_in_Prison11.pdf) (last visited Feb. 25, 2018).

<sup>10</sup> LA. ADMIN. CODE tit. 22, pt. III § 3303(C) (2017).

<sup>11</sup> LA. ADMIN. CODE tit. 22, pt. III § 3303(D) (2017).

<sup>12</sup> Dep't. of Pub. Safety and Corr., Inside the System: How Inmates Live and Work (2009), at 13, *available at* [https://www.webcitation.org/6Bdg2h6fj?url=http://www.corrections.state.la.us/Wordpress/wp-content/uploads/2009/10/Time\\_in\\_Prison11.pdf](https://www.webcitation.org/6Bdg2h6fj?url=http://www.corrections.state.la.us/Wordpress/wp-content/uploads/2009/10/Time_in_Prison11.pdf) (last visited Feb. 25, 2018).

<sup>13</sup> B-02-016 Reception and Diagnostic Processing (2011), at 6.

<sup>14</sup> B-02-016 Reception and Diagnostic Processing (2011), at 6.

<sup>15</sup> B-02-016 Reception and Diagnostic Processing (2011), at 6.

<sup>16</sup> Dep't. of Pub. Safety and Corr., Inside the System: How Inmates Live and Work (2009), at 13, *available at* [https://www.webcitation.org/6Bdg2h6fj?url=http://www.corrections.state.la.us/Wordpress/wp-content/uploads/2009/10/Time\\_in\\_Prison11.pdf](https://www.webcitation.org/6Bdg2h6fj?url=http://www.corrections.state.la.us/Wordpress/wp-content/uploads/2009/10/Time_in_Prison11.pdf) (last visited Feb. 25, 2018).

<sup>17</sup> Dep't. of Pub. Safety and Corr., Inside the System: How Inmates Live and Work (2009), at 13, *available at* [https://www.webcitation.org/6Bdg2h6fj?url=http://www.corrections.state.la.us/Wordpress/wp-content/uploads/2009/10/Time\\_in\\_Prison11.pdf](https://www.webcitation.org/6Bdg2h6fj?url=http://www.corrections.state.la.us/Wordpress/wp-content/uploads/2009/10/Time_in_Prison11.pdf) (last visited Feb. 25, 2018).

Initial classification separates men from women, juveniles (kids) from adults, and prisoners who have special problems from the general population.<sup>18</sup>

More specifically, you will be classified based on:

- 1) Length of sentence;
- 2) Security risk;
- 3) Special medical or mental health needs;
- 4) Available bed space at corrections facilities; and
- 5) Proximity to family (how close to the prison your family lives).<sup>19</sup>

To help classify you based on these reasons, you will have to do some tests.<sup>20</sup> Three things help decide your custody level: first, public safety, then safety of staff and prisoners, and lastly, your special needs and the needs of your institution.<sup>21</sup> Other factors include, but are not limited to, offense, sentence, age, adjustment potential, excessive criminal behavior, escape history, transitional work program eligibility date and observable behavior will also be considered in all classification decisions.<sup>22</sup>

Typically, prisoners with a sentence of life imprisonment or a sentence that is longer than 30 years until the earliest possible release date are classified to the Louisiana State Penitentiary.<sup>23</sup> There is only one state prison for women, though women may also be confined in local jails.<sup>24</sup> For other prisoners, there are some more prison facilities where you might be sent.

### 3. Administrative Segregation, Disciplinary Detention, and Protective Custody

There are other kinds of custody that are used in special circumstances. These are the working cellblock, administrative segregation, disciplinary detention/extended lockdown, and protective custody. In a working cellblock, prisoners are assigned the maximum custody level, but are permitted access to work and other prison programs.<sup>25</sup> Administrative segregation is for prisoners who pose a security threat to themselves, others, or the facility, or who may be under investigation.<sup>26</sup> You may also be placed in administrative segregation if you request protective custody. If you request protective custody, you will be placed in administrative segregation until a disciplinary officer or classification board makes a decision on your request.<sup>27</sup> You may be placed in disciplinary detention or extended lockdown if you are found guilty of an infraction.<sup>28</sup> Finally, you can be placed in protective custody or extended lockdown if you require protection from other prisoners.<sup>29</sup> You must request protective custody in writing. If you are able, you should keep a copy of this request.<sup>30</sup>

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<sup>18</sup> La. Admin. Code, tit. 22, pt. III § 3303(B) (2017).

<sup>19</sup> Dep't. of Pub. Safety and Corr., *Inside the System: How Inmates Live and Work* (2009), at 13, *available at* [https://www.webcitation.org/6Bdg2h6fj?url=http://www.corrections.state.la.us/WordPress/wp-content/uploads/2009/10/Time\\_in\\_Prison11.pdf](https://www.webcitation.org/6Bdg2h6fj?url=http://www.corrections.state.la.us/WordPress/wp-content/uploads/2009/10/Time_in_Prison11.pdf) (last visited Feb. 25, 2018).

<sup>20</sup> Dep't. of Pub. Safety and Corr., Department Regulation B-02-016 Reception and Diagnostic Processing (2011), at 6.

<sup>21</sup> Dep't. of Pub. Safety and Corr., Department Regulation B-02-016 Reception and Diagnostic Processing (2011), at 6.

<sup>22</sup> Dep't. of Pub. Safety and Corr., Department Regulation B-02-016 Reception and Diagnostic Processing (2011), at 6.

<sup>23</sup> Dep't. of Pub. Safety and Corr., *Inside the System: How Inmates Live and Work* (2009), at 13, *available at* [https://www.webcitation.org/6Bdg2h6fj?url=http://www.corrections.state.la.us/WordPress/wp-content/uploads/2009/10/Time\\_in\\_Prison11.pdf](https://www.webcitation.org/6Bdg2h6fj?url=http://www.corrections.state.la.us/WordPress/wp-content/uploads/2009/10/Time_in_Prison11.pdf) (last visited Feb. 25, 2018).

<sup>24</sup> Dep't. of Pub. Safety and Corr., *Inside the System: How Inmates Live and Work* (2009), at 14, *available at* [https://www.webcitation.org/6Bdg2h6fj?url=http://www.corrections.state.la.us/WordPress/wp-content/uploads/2009/10/Time\\_in\\_Prison11.pdf](https://www.webcitation.org/6Bdg2h6fj?url=http://www.corrections.state.la.us/WordPress/wp-content/uploads/2009/10/Time_in_Prison11.pdf) (last visited Feb. 25, 2018).

<sup>25</sup> Dep't. of Pub. Safety and Corr., Department Regulation No. B-02-019, Custody Levels (2013), at 7.

<sup>26</sup> Dep't. of Pub. Safety and Corr., Department Regulation No. B-02-019, Custody Levels (2013), at 3.

<sup>27</sup> Dep't. of Pub. Safety and Corr., Department Regulation No. B-02-019, Custody Levels (2013), at 4.

<sup>28</sup> Dep't. of Pub. Safety and Corr., Department Regulation No. B-02-019, Custody Levels (2013), at 4–5.

<sup>29</sup> Dep't. of Pub. Safety and Corr., Department Regulation No. B-02-019, Custody Levels (2013), at 5–6.

<sup>30</sup> Dep't. of Pub. Safety and Corr., Department Regulation No. B-02-019, Custody Levels (2013), at 4.

#### 4. Classification Reviews

Your classification can be changed. Classifications can be changed if your circumstances in prison change. Making classification changes involve some of the same issues as the initial classification. Also, making classification changes will involve anything that has happened since you have been confined. Prisons and jails may have different procedures regarding the reclassification of prisoners, so you should check with your classification officer to learn the exact procedures that are followed at your facility.<sup>31</sup> Also, if you are placed in a working cellblock, administrative segregation, disciplinary detention/extended lockdown, or protective custody, your status will be reviewed regularly.<sup>32</sup> You may also submit a written request for a change in your classification. You should check with your classification officer about the policies at your facility for requesting a classification change or review.

### C. CHALLENGING YOUR CLASSIFICATION

Prison officials get great deference when they make and enforce administrative and disciplinary measures. This includes classification. This means that prison officials have a lot of freedom to classify prisoners as they like so long as it follows the law. Both state and federal courts do not often overturn classification decisions made by prison officials.<sup>33</sup> The U.S. Supreme Court has said that prisons should have a lot of freedom to decide classifications because it is necessary to maintain security and preserve internal order.<sup>34</sup> For this reason, legal challenges may be very difficult. Administrative challenges are more likely to be helpful, but the likelihood of success in administrative challenges is still low.

#### 1. Legal Challenges

One option to appeal your classification is to file a legal claim. But, courts don't like to change classification decisions. Also, you do not have a right to a particular classification under Louisiana state law.<sup>35</sup> However, you do have rights under the Fourteenth Amendment of the U.S. Constitution. Even though courts do not change a lot of classification decisions, you should still try to challenge your classification decision if you think you have a good case.<sup>36</sup>

Before you bring a legal claim, you should appeal your classification through administrative remedy procedures. The Prison Litigation Reform Act ("PLRA") requires that you exhaust all your administrative appeals before filing a legal claim.<sup>37</sup> For more information on the PLRA, *see* Chapter 14 of the main *JLM*. Administrative procedures are also important because few prisoners succeed in challenging their custody status through court action.

##### a. Due Process Claims

The Due Process Clause of the Fourteenth Amendment protects individuals, including prisoners, from the loss of "life, liberty, or property" at the hands of the government without due process of law.<sup>38</sup> You can bring a Due Process claim in state or federal court. In *Sandin v. Conner*, the U.S. Supreme Court created the current way to determine whether conditions of imprisonment (how you're held in prison) violate due

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<sup>31</sup> *See, e.g.*, Lafayette Parish Sheriff's Office, J-0600, Reclassification (2010), *available at* [http://www.lafayettesheriff.com/uploads/J\\_0600\\_Reclassification.pdf](http://www.lafayettesheriff.com/uploads/J_0600_Reclassification.pdf) (last visited Mar. 10, 2018).

<sup>32</sup> Dep't. of Pub. Safety and Corr., Department Regulation B-02-019, Custody Levels (2013), at 3–6.

<sup>33</sup> *McGruder v. Phelps*, 608 F.2d 1023, 1026 (5th Cir. 1978) ("Prison officials must have broad discretion, free from judicial intervention, in classifying prisoners in terms of their custodial status." (*citing* *Montaye v. Haymes*, 427 U.S. 236, 242, 96 S. Ct. 2543, 2547, 49 L. Ed. 2d 466 (1976))).

<sup>34</sup> *Bell v. Wolfish*, 441 U.S. 520, 546, 99 S. Ct. 1861, 1878, 60 L. Ed. 2d. 447 (1979) ("[M]aintaining institutional security and preserving internal order . . . are essential goals that may require limitation . . . of the retained constitutional rights of . . . convicted prisoners.").

<sup>35</sup> *McGruder v. Phelps*, 608 F.2d 1023, 1026 (5th Cir. 1978).

<sup>36</sup> *McCord v. Maggio*, 910 F.2d 1248, 1249 (5th Cir. 1990) ("This judicial restraint, however, cannot involve the failure to recognize the validity of constitutional claims.") (citations omitted).

<sup>37</sup> LA. REV. STAT. ANN. § 15:1184(A)(2) (2017).

<sup>38</sup> U.S. CONST. amend. XIV, § 1. For a more detailed discussion of "liberty interests" and the degree of due process rights owed to prisoners, *see* Chapter 18 of the main *JLM*, "Your Rights at Prison Disciplinary Proceedings."

process.<sup>39</sup> This focuses on the nature of the deprivation (loss) suffered by the prisoner. Be careful when researching this issue. A lot of case law on prisoner classification was decided under an old standard. You must make sure that the cases you research use the current *Sandin* standard, which is described in the next paragraph. The U.S. Supreme Court decided *Sandin* in 1995, so looking for cases after 1995 will be helpful.

In *Sandin*, the Court held that state-created liberty interests “will be generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”<sup>40</sup> Also, the hardship imposed upon the prisoner must be of “real substance.”<sup>41</sup> This means that you need to show that your classification creates atypical and significant hardship for you. You also need to show that the hardship is substantial. When arguing that your classification is atypical and significant, compare it to what other prisoners have experienced in similar circumstances.<sup>42</sup> You should think about how your classification is different than others. Differences could be about how long you’ve been classified at a certain level, compared to similar prisoners. Differences could also be about how you’re classified, compared to similar prisoners. Make sure to say how your classification compares to your history, health, and other factors normally considered in classification decisions.<sup>43</sup> Explain why the classification imposes a substantial hardship on you.

Prisoners have not been very successful in meeting this standard in either Louisiana state courts or federal courts.<sup>44</sup> Following *Sandin*, courts don’t like to find that a particular security classification is a deprivation of a constitutional liberty interest.<sup>45</sup> It is no longer enough to merely show that prison officials did not follow the classification guidelines. Instead, you will have to convince the court that the official’s decision to classify you in a particular way constituted an atypical and significant liberty deprivation.

If you want to make a due process claim, you should file a claim under 42 U.S.C. § 1983 (“Section 1983”). Section 1983 is a federal law that protects you from violations of constitutional rights by state actors. It allows you to sue in federal court.<sup>46</sup> For information on how to file a claim under Section 1983, see Chapter

<sup>39</sup> *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995) (finding no liberty interest in prisoner’s administrative segregation absent atypical, significant deprivation).

<sup>40</sup> *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 430 (1995).

<sup>41</sup> *Sandin v. Conner*, 515 U.S. 472, 480, 115 S. Ct. 2293, 2298, 132 L. Ed. 2d 418, 427 (1995). See, e.g., *Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999) (finding that a due process claim was meritless because the prisoner had no protectable interest in custodial classification and did not allege physical injury in claim for damages); *Martin v. Scott*, 156 F.3d 578, 580 (5th Cir. 1998) (holding under ordinary circumstances administrative segregation will never be grounds for a constitutional claim because it does not constitute deprivation of a constitutional liberty interest).

<sup>42</sup> See *Giles v. Cain*, 762 So.2d 734, 739 (La. Ct. App. 1st Cir. 2000) (holding that prisoner’s confinement in extended lockdown was not atypical or significant, in part because there was no showing it differed from what other prisoners experienced in similar circumstances).

<sup>43</sup> See *Giles v. Cain*, 762 So.2d 734, 739 (La. Ct. App. 1st Cir. 2000).

<sup>44</sup> See, e.g., *Williams v. Dep’t. of Public Safety and Corr.*, 2011 WL 2981196, at \*1, (La. Ct. App. 1st Cir. 2011) (“a change of custody status is not atypical nor a significant hardship in relation to the ordinary incidents of prison life”); *Parker v. LeBlanc*, 845 So.2d 445, 446 (La. Ct. App. 1st Cir. 2003) (“[C]hange in custody status from medium to maximum and a thirty-day confinement was not atypical or a significant hardship in relation to the ordinary incidents of prison life”); *Marquez v. Dep’t of Corr.*, 2012 WL 2061150, at \*2, (La. Ct. App. 1st Cir. 2012) (citing *Parker v. LeBlanc*, 845 So.2d 445 (La. Ct. App. 1st Cir. 2003)) (holding that transfer to another cell block did not impose an atypical and significant hardship on the prisoner); *Thomas v. Cain*, 2008 WL 4287549, at \*2, (La. Ct. App. 1st Cir. 2008) (“The imposition of the penalty of a change in security from minimum to medium within a maximum security prison, was not atypical or a significant hardship in relation to the ordinary incidents of prison life.”).

<sup>45</sup> See, e.g., *Wilkerson v. Stalder*, 329 F.3d 431, 435–436 (5th Cir. 2003) (“Generally, courts are not concerned with a prisoner’s initial classification level based on his criminal history before his incarceration. This circuit has continued to hold post-*Sandin* that an inmate has no protectable liberty interest in his classification.”). See *Lee v. Karriker*, 383 F. App’x 491, 492, 2010 U.S. App. LEXIS 13011 (5th Cir. 2010) (finding that the placement of a “security precaution designator” on prisoner’s file without a disciplinary hearing does not implicate the deprivation of a constitutional right); *Pichardo v. Kinker*, 73 F.3d 612, 613, 1996 U.S. App. LEXIS 1498 (5th Cir. 1996) (holding that, absent extraordinary circumstances, placement in administrative segregation will never be a ground for a constitutional claim); *Luken v. Scott*, 71 F.3d 192, 193, 1995 U.S. App. LEXIS 36348 (5th Cir. 1995) (holding that administrative segregation, resulting in a lost opportunity to earn good-time credits, does not represent a deprivation of a constitutionally cognizable liberty interest).

<sup>46</sup> See, e.g., *Monroe v. Pape*, 365 U.S. 167, 204, 81 S. Ct. 473, 493, 5 L. Ed. 2d 492, (1961) (applying § 1983 to illegal search of civilian home and detention of citizen by police).



16 of the main *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law.” For more information on filing a legal claim after pursuing administrative remedies, *see* Chapter 9 of the *Louisiana State Supplement* on grievance procedures and administrative remedy procedures.

## 2. Administrative Options

The primary way of challenging a classification decision is through the Administrative Remedy Procedure (“ARP”).<sup>47</sup> The ARP and other grievance procedures should have been explained to you when you entered prison.<sup>48</sup> You may also contact your classification officer for assistance on how to use the ARP. Before going to court, you first should use the ARP to challenge a classification decision. This is because courts are unlikely to change a classification decision. Also, you must exhaust administrative remedies before you can file a legal claim.<sup>49</sup> For more information on the ARP and grievance procedures, *see* Chapter 9 of the *Louisiana State Supplement*.

The ARP’s purpose is to allow for a formal review of any complaint relating to your incarceration, including classification decisions.<sup>50</sup> After you are assigned a classification, you can appeal the decision through the ARP within 90 days.<sup>51</sup> If the decision from the ARP is not what you want, you may appeal the ARP decision. If you do not like the decision of the ARP appeal, you may then file a claim in state or federal court.

To start the ARP process, you must write a letter to the warden requesting ARP (or use a form if there is one available) within 90 days of getting the classification decision.<sup>52</sup> In this request, you should explain the problem with the classification decision you are appealing. Your request will be screened. Requests are screened to make sure they meet certain requirements, including that you followed proper procedure.<sup>53</sup> The warden will have 40 days to respond to you.<sup>54</sup> If you do not like this decision, you may appeal directly to the secretary of the Department of Public Safety and Corrections.<sup>55</sup> You have to do this within 5 days of getting the warden’s decision.<sup>56</sup> The secretary will then have 45 days to respond to you.<sup>57</sup> If you do not like the secretary’s response to you, then you may file a claim in court within 30 days.<sup>58</sup> If you are able, you should keep copies of your letters and decisions related to the ARP.

It may be difficult to successfully challenge a classification decision. This should not stop you from appealing a classification decision, but it means that you should make sure to follow procedure as closely as possible and make the best case you can.

## D. GANG AFFILIATION AND CLASSIFICATION

Unlike some other states, Louisiana does not have a formal process for classifying and then segregating suspected gang members from the rest of the prison population. However, gang affiliations can be a part of the classification process. This includes when you get a custody level. This is because the

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<sup>47</sup> LA. ADMIN. CODE tit. 22, pt. I, § 325 (2017).

<sup>48</sup> LA. ADMIN. CODE tit. 22, pt. I, § 325(F)(3)(a)(i)(a) (2017).

<sup>49</sup> LA. REV. STAT. ANN. § 15:1184(A)(2) (2017).

<sup>50</sup> LA. ADMIN. CODE tit. 22, pt. I, § 325(D) (2017).

<sup>51</sup> LA. ADMIN. CODE tit. 22, pt. I, § 325(G)(1) (2017).

<sup>52</sup> LA. ADMIN. CODE tit. 22, pt. I, § 325(G)(1) (2017).

<sup>53</sup> LA. ADMIN. CODE tit. 22, pt. I, § 325(I)(1) (2017).

<sup>54</sup> LA. ADMIN. CODE tit. 22, pt. I, § 325(J)(1)(a)(ii) (2017).

<sup>55</sup> LA. ADMIN. CODE tit. 22, pt. I, § 325(J)(1)(b)(i) (2017).

<sup>56</sup> LA. ADMIN. CODE tit. 22, pt. I, § 325(J)(1)(b)(i) (2017).

<sup>57</sup> LA. ADMIN. CODE tit. 22, pt. I, § 325(J)(1)(b)(ii) (2017).

<sup>58</sup> LA. ADMIN. CODE tit. 22, pt. I, § 325(J)(1)(b)(iv) (2017); LA. REV. STAT. ANN. § 15:1177(A) (2017).

classification process considers the security risk you pose to public safety, prison staff, and other prisoners.<sup>59</sup> Additionally, prisons and jails may assess gang affiliation to take additional security precautions.<sup>60</sup>

### E. CONCLUSION

Your security classification is important because it decides where you can live and what kind of supervision you have in prison. Prison officials usually get a lot of freedom to decide how you will be classified. Officials make their classification decisions because of many different reasons. You can still challenge your classification by administrative means and in court. To challenge your classification, you first must use administrative remedy procedures even if you want to file a legal claim in court. Administrative remedy procedures may also offer a better chance of success in challenging classification decisions.

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<sup>59</sup> Dep't. of Pub. Safety and Corr., *Inside the System: How Inmates Live and Work* 13 (2009), *available at* [https://www.webcitation.org/6Bdg2h6fj?url=http://www.corrections.state.la.us/Wordpress/wp-content/uploads/2009/10/Time\\_in\\_Prison11.pdf](https://www.webcitation.org/6Bdg2h6fj?url=http://www.corrections.state.la.us/Wordpress/wp-content/uploads/2009/10/Time_in_Prison11.pdf) (last visited Jan. 18, 2018).

<sup>60</sup> *See, e.g.*, Lafayette Parish Sheriff's Office, J-4700, *Security Threat Groups* (2010), *available at* [http://www.lafayettesheriff.com/uploads/J\\_4700\\_SecurityThreatGroups.pdf](http://www.lafayettesheriff.com/uploads/J_4700_SecurityThreatGroups.pdf) (last visited Jan. 18, 2018).

# CHAPTER 13: YOUR RIGHT TO PRIVATE COMMUNICATIONS\*

## A. INTRODUCTION

Communication with the outside world while you are in prison is important for your future and wellbeing. Keeping in touch with your family can help you rejoin your community when you are released, and communicating with your attorney is necessary for you to stay involved with your legal defense. However, prison administrators are allowed to restrict your communication with courts, attorneys, family, friends, and the news media. Courts give prison officials great authority in making decisions about prison administration. The prison authorities, however, cannot completely restrict your ability to communicate. The U.S. and state constitutions, as well as federal, state, and city regulations, limit prison administrators' power to restrict your access to the outside world. You keep some constitutional rights upon imprisonment, like parts of your First Amendment protections of speech, press, and religion.<sup>1</sup> However, the prison administration can limit these rights if they need to maintain prison security or order or further their goals of rehabilitating prisoners. The Louisiana Constitution gives you a right to private communications and allows you to challenge a violation of that right in court.<sup>2</sup>

## B. THE RIGHT TO GENERAL NON-LEGAL CORRESPONDENCE

### 1. Your Federal Constitutional Protections

The First Amendment to the U.S. Constitution creates a minimum level of protection of your right to communicate with the outside world. This means that no government may pass laws or regulations falling below this level of protection. Courts treat incoming mail (mail sent to you) and outgoing mail (mail sent by you) differently. Restrictions on incoming mail are greater than on outgoing mail because incoming mail can pose a greater security threat within the prison.

#### a. Outgoing Correspondence

Restrictions on outgoing, non-legal mail must further an important governmental objective, *and* the restriction must be no greater than necessary to further that goal.<sup>3</sup> An individual normally has a reasonable expectation of privacy in his own home that protects him from police searches done without a warrant, or without official permission from a judge. However, the Supreme Court held that prisoners do not have this expectation of privacy in their prison cells.<sup>4</sup> This reasoning extends to your outgoing mail. Therefore, a prison official does not need a search warrant to read your outgoing mail, even if he has only suspicions about what might be in it.<sup>5</sup>

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\* This Chapter of the Louisiana Supplement was written by Raquel Toledo.

<sup>1</sup> U.S. CONST. amend. I; *Bell v. Wolfish*, 441 U.S. 520, 545, 99 S. Ct. 1861, 1877, 60 L. Ed. 2d 447, 472 (1979). Courts generally do not decide whether incarcerated people continue to have constitutional rights and instead determine whether the restriction on the right is reasonable. *See, e.g., Overton v. Bazzetta*, 539 U.S. 126, 131–132, 123 S. Ct. 2162, 2167–2168, 156 L. Ed. 2d 162, 169–170 (2003).

<sup>2</sup> *See* LA. CONST. ANN. art. I, § 5 (“Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy . . . Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.”).

<sup>3</sup> *Procunier v. Martinez*, 416 U.S. 396, 413–414, 94 S. Ct. 1800, 1811, 40 L. Ed. 2d 224, 240 (1974) (holding that restrictions on mail must satisfy this test); *Thornburgh v. Abbott*, 490 U.S. 401, 413, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 473 (1989) (limiting the *Martinez* test to outgoing mail).

<sup>4</sup> *Hudson v. Palmer*, 468 U.S. 517, 525–526, 104 S. Ct. 3194, 3200 (1984) (holding that the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell).

<sup>5</sup> *See State v. Dunn*, 478 So. 2d 659, 663 (La. App. 2 Cir. 1985) (holding that a prison deputy did not violate prisoner's right against unreasonable searches and seizures when he searched prisoner's outgoing mail after another prisoner reported a theft of a one-hundred-dollar bill).

### b. Incoming Correspondence

In deciding whether a restriction on *incoming* correspondence (mail and publications sent to you) is constitutional, the Court has held that the proper standard of review is that the regulations must be *reasonably related* to a legitimate penological interest (things important to running a prison, for example, security, order, or rehabilitation).<sup>6</sup> This means that prison officials can restrict mail and publications being sent to you as long as their purpose in limiting your mail is reasonably related to a legitimate goal like maintaining security within the prison or ensuring that prisoners are rehabilitated.

### c. “As Applied” versus “Facial” Challenges

There are two ways to challenge restrictions on your right to non-legal correspondence: “facial” challenges and “as applied” challenges. A facial challenge to a law claims the law is always unconstitutional, no matter how it is applied. This type of challenge can be based on a number of legal arguments. For example, the law could conflict with a specific amendment to the U.S. Constitution, also known as the Bill of Rights, or it might be too broad and limit more actions or people than needed to achieve its goal. This is different from an “as applied” challenge, which argues that a law or regulation is unconstitutional in a particular situation or with a specific type of person.

The case *Vodicka v. Phelps* is a helpful example of the difference between these two challenges.<sup>7</sup> In that case, a prisoner challenged the constitutionality of a rule restricting incoming mail with both “facial” and “as applied” challenges. In *Vodicka*, a prison warden at Angola prohibited the Louisiana Coalition on Jails and Prisons (LCJP) from distributing an issue of a newsletter called “Inside,” because the lead article was about a recent prisoner work strike that occurred at the prison and called for the creation of a labor union for prisoners. The court noted that the prison warden had met with the publisher promptly and told LCJP that the newsletter would not be distributed but that earlier and later editions were not banned.<sup>8</sup> The court upheld this rule as constitutional both “facially” and “as applied.”

First, the plaintiff (the person who brought the case to court, or *Vodicka* in this case) challenged the restriction using a “facial” challenge. He argued that the regulation being challenged was “void for vagueness.” The regulation stated that inmates were allowed to receive books, magazines, newspapers and other printed materials unless they created an immediate threat to the security of the institution.<sup>9</sup> *Vodicka* believed this rule did not give people enough of a warning of what could and could not be sent to prisoners and said it gave prison officials “unbridled discretion” to decide what was an “immediate threat.” He argued that the regulation could be written more specifically and still achieve the same purpose. This is a facial challenge because it challenges the law itself, not the way the law is applied to the prisoners. The court held that the regulation was facially valid and constitutional because it met the standard in place at the time.<sup>10</sup> The court also held that the language clearly required the prison officials to show that the publication was “in fact detrimental to a legitimate government interest.”<sup>11</sup>

*Vodicka* also challenged the regulation as unconstitutional “as applied.” *Vodicka* argued that the prison only banned this newsletter because of the identity of the sender, not because the content posed a threat. While *Vodicka*’s newsletter had been banned, a different news story from the New Orleans Times-Picayune had been allowed in the prison. The court held that the prison was allowed to consider the identity of the sender in determining the threat posed by the newsletter.<sup>12</sup> There was a history of conflict between

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<sup>6</sup> *Thornburgh v. Abbott*, 490 U.S. 401, 404, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459, 467 (1989) (citing *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261–2262, 96 L. Ed. 2d 64, 79 (1987)).

<sup>7</sup> *Vodicka v. Phelps*, 624 F.2d 569 (5th Cir. 1980).

<sup>8</sup> *Vodicka v. Phelps*, 624 F.2d 569, 575 (5th Cir. 1980).

<sup>9</sup> *Vodicka v. Phelps*, 624 F.2d 569, 570 (5th Cir. 1980).

<sup>10</sup> The standard at the time was that the regulation must be “no greater than necessary” to help the legitimate government interest. This standard was later overruled and replaced by one that gave more power to prison officials. *Procunier v. Martinez*, 416 U.S. 396, 94 S. Ct. 1800, 1803, 40 L. Ed. 2d 224 (1974), *overruled by* *Thornburgh v. Abbott*, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989).

<sup>11</sup> *Vodicka v. Phelps*, 624 F.2d 569, 571 (5th Cir. 1980).

<sup>12</sup> *Vodicka v. Phelps*, 624 F.2d 569, 575 (5th Cir. 1980).

Vodicka's organization and prison officials, and the prison warden believed that communications between the prisoners and the LCJP had encouraged the strike, which caused a major disruption from which the prison was just recovering. The prison warden also said Vodicka's newsletter contained factual inaccuracies, most importantly attributing statements to prison officials that the warden said they had never made.<sup>13</sup> Significantly, the court's decision did not depend on the factual inaccuracies in the newsletter. Rather, the court held that prisons can decide a specific sender may pose a threat regardless of what is contained in his message.<sup>14</sup>

d. Legal Protections

Prison officials must still respect important rights that you have related to getting and sending mail. First, a prisoner should be notified if prison officials return a letter addressed to him or if a letter sent by a prisoner is returned to the prison. Second, the person who wrote the returned letter should be allowed to make a complaint to the prison about their mail being rejected and not delivered to the prisoner.

i. *State and Federal Protections of the Right to General (Non-Legal) Correspondence*

A number of factors determine which regulations apply to you. The first thing you should find out is whether you are in a federal or Louisiana state prison. If you are in federal prison, your conviction was probably for a crime against the United States or a crime violating the Washington, D.C. code. Regulations governing your communications while you are incarcerated can be found in the Code of Federal Regulations at Title 28, Chapter V, Subchapter C, Part 540. This Part is called, "Contact with Persons in the Community."<sup>15</sup> If you are in Louisiana state prison for crimes under Louisiana law, rules governing your personal communications are in the Louisiana Administrative Code, Title 22, Part 1, Chapter 3, Subchapter A.<sup>16</sup> In addition to the type of prison you are in, other factors may affect your correspondence. This Chapter will try to point out those factors, but you should carefully read any prisoner manuals available to you, as well as the laws that apply to you, since they could change after this Louisiana Supplement is published.

(a) Federal Regulations

Generally, the staff at a federal prison opens and inspects all incoming mail, and they may read incoming mail to keep security or to keep track of a specific prisoner.<sup>17</sup> Outgoing mail may also be read by staff, so you cannot seal it.<sup>18</sup> An important exception to this rule is "special mail." Special mail is defined differently for incoming and outgoing mail. For outgoing mail, special mail includes mail sent to the "President and Vice President of the United States, the U.S. Department of Justice (including the Bureau of Prisons), U.S. Attorneys Offices, Surgeon General, U.S. Public Health Service, Secretary of the Army, Navy, or Air Force, U.S. Courts (including U.S. Probation Officers), Members of the U.S. Congress, Embassies and Consulates, Governors, State Attorneys General, Prosecuting Attorneys, Directors of State Departments of Corrections, State Parole Commissioners, State Legislators, State Courts, State Probation Officers, other Federal and State law enforcement offices, attorneys, and representatives of the news media."<sup>19</sup> The list of special mail senders is smaller. It includes mail received from "[the] President and Vice President of the United States, attorneys, Members of the U.S. Congress, Embassies and Consulates, the U.S. Department of Justice (excluding the Bureau of Prisons but including U.S. Attorneys), other Federal law enforcement officers, State Attorneys General, Prosecuting Attorneys, Governors, U.S. Courts (including U.S. Probation Officers), and State Courts."<sup>20</sup>

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<sup>13</sup> *Vodicka v. Phelps*, 624 F.2d 569, 574 (5th Cir. 1980).

<sup>14</sup> *Vodicka v. Phelps*, 624 F.2d 569, 575 (5th Cir. 1980).

<sup>15</sup> 28 C.F.R. § 540 (2017).

<sup>16</sup> LA. ADMIN. CODE tit. 22, pt. I (2017).

<sup>17</sup> 28 C.F.R. § 540.14(a) (2017).

<sup>18</sup> 28 C.F.R. § 540.14(b) (2017).

<sup>19</sup> 28 C.F.R. § 540.2(c) (2017).

<sup>20</sup> 28 C.F.R. § 540.2(c) (2017).

For incoming mail to be considered special mail, it must state who the sender is, and the front of the envelope must be marked, “Special mail—open only in the presence of the inmate.”<sup>21</sup> This means prison staff may open incoming special mail, but you must be there when they do. Additionally, prison staff may only inspect the mail for physical contraband, or prohibited items. They may not read or copy the mail.<sup>22</sup> You can seal the outgoing special mail and it may not be inspected by prison staff unless you have been placed on “restricted special mail status.”<sup>23</sup> An example of why you might be placed on restricted special mail status is if you have used special mail to threaten officials in the past.<sup>24</sup> The warden must tell you in writing why you were placed on restricted special mail status, and he or she must review the decision every 180 days.<sup>25</sup> You may still send special mail if you are on restricted status, but the mail and the packaging will be inspected before you seal it.<sup>26</sup>

Prison officials may not open and read mail that you are sending out from a minimum- or low-security prison. The only exceptions to this are if the officials think the mail would affect the orderly running of the prison, that it would be threatening to the person it is being sent to, or that it would lead to criminal activity.<sup>27</sup> In medium- and high-security institutions, prison officials may read all mail other than “special mail.”<sup>28</sup>

Federal prisons must give you paper and envelopes at no cost, but you must pay for stamps. If you cannot afford stamps, the warden must provide them for a reasonable number of letters each month.<sup>29</sup>

#### (b) Louisiana Regulations

As a Louisiana prisoner, you are allowed to send mail as often as you wish, unless prison officials believe that they need to limit you to protect public safety or order in the prison.<sup>30</sup> You may send mail to anyone, with a few exceptions. You may not write to:<sup>31</sup>

- 1) A victim of any crime for which you have been convicted, or for which disposition (the court’s final determination) is pending, or to an immediate family member of the victim, except by following specific rules established by department regulations or by the warden along with the Crime Victims Services Bureau.
- 2) Any person under the age of 18 when that person’s parent or guardian states verbally or in writing that he or she is against such mail.
- 3) Any person that a court order prohibits you from writing to.
- 4) Any person who has made a verbal or written request to not receive mail from you.
- 5) Any other person, when prohibiting such correspondence is needed to promote security, order, or rehabilitation.

Louisiana requires prisoners to pay for their own mailing fees.<sup>32</sup> If you are indigent (meaning you cannot afford to pay), the prison will give you the postage needed to send two personal letters each week,

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<sup>21</sup> 28 C.F.R. § 540.2(c) (2017).

<sup>22</sup> 28 C.F.R. § 540.18(a) (2017).

<sup>23</sup> 28 C.F.R. § 540.18(c)(1) (2017). Since outgoing special mail is not inspected unless you are on restricted special mail status, the mail will be stamped with a warning statement to the receiver. The statement reads: “The enclosed letter was processed through special mailing procedures for forwarding to you. The letter has neither been opened nor inspected. If the writer raises a question or problem over which this facility has jurisdiction, you may wish to return the material for further information or clarification. If the writer encloses correspondence for forwarding to another addressee, please return the enclosure to the above address.” 28 C.F.R. § 540.18(d) (2017).

<sup>24</sup> 28 C.F.R. § 540.18(c)(2)(i) (2017).

<sup>25</sup> 28 C.F.R. §§ 540.18(c)(2)(ii), (iv) (2017).

<sup>26</sup> 28 C.F.R. § 540.18(c)(2)(iii) (2017).

<sup>27</sup> 28 C.F.R. § 540.14(c)(1)(i) (2017).

<sup>28</sup> 28 C.F.R. § 540.14(c)(2) (2017).

<sup>29</sup> 28 C.F.R. §§ 540.21(a), (b), (d), (e) (2017).

<sup>30</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(F)(1) (2017).

<sup>31</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(F)(3) (2017).

<sup>32</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(F)(4) (2017).

postage needed to send out approved legal mail on a reasonable basis, and basic supplies needed to prepare legal documents.<sup>33</sup> However, your account will show the cost of the postage and supplies as a debt owed.

Like the federal rules, Louisiana prison rules allow prison employees to read and inspect your outgoing mail, as well as “farm mail” (mail sent to other prisoners within the same prison).<sup>34</sup> Mail inspection is meant mostly to look for and find illegal objects. The purpose of reading the mail is to discover any planned crimes or threats or the sending of controlled materials (such as sexually explicit materials, discussed further in Section E(2) of this Chapter). Prison officials have to tell you within 3 business days (weekdays, Monday to Friday) if your mail is rejected, and they must explain why it is rejected. An exception to this rule is if there is an ongoing investigation of your mail and telling you about the rejection might disrupt the investigation.<sup>35</sup> You may appeal a decision to reject your mail by using the administrative remedy procedure, which is another name for the procedure your prison has set up for dealing with prisoner complaints.

When you send or receive mail, it must follow prison rules. Outgoing mail must include a complete legible (readable) name and address of the party to whom you are mailing, as well as your name, your DOC number, your housing unit, and the name and mailing address of the prison. This information should be written or typed on the upper-left corner of the envelope. Drawings, writings, and markings on envelopes, other than return and sending addresses, are not allowed. Before mail leaves the prison mailroom, it will be stamped to show that it came from a prison.<sup>36</sup>

Your family and friends are allowed to send you money, but must send it through a system called JPay, which handles the DOC's money transactions.<sup>37</sup> Money may be sent in a number of ways: by mail, at walk-up locations of MoneyGram, over the Internet, by telephone, and at kiosks in prison visiting areas. Only money orders may be sent by mail, and they must include a JPay deposit slip.<sup>38</sup> The sender will have to send the money order to JPay directly at its office in Miami. JPay will then process the money and transmit it to your DOC account. This process could take a few days, so you should consider other options if you need money faster.<sup>39</sup> Any money sent directly to you will be rejected and returned to the sender.<sup>40</sup> You will be told about the rejection and will have to pay for the return of the mail.<sup>41</sup> There are various fees and limits on the amount of money that can be sent for the other types of money transfers. You should check the description of JPay's service and decide with the sender which is the best method for you.

You are not allowed to receive packages from home. Only packages containing release clothes can be sent from home, and they must be sent within 30 days of your release. The package will be held for you until your release.<sup>42</sup>

## ii. *A Note on Foreign-Language Materials*

If the prisoner sending outgoing letters speaks English and if the letters are written in code or in a foreign language, they may be restricted, seized, returned to you, kept for further investigation, referred for

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<sup>33</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(F)(4) (2017).

<sup>34</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(F)(5) (2017).

<sup>35</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(F)(5)(b) (2017).

<sup>36</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(F)(5)(d) (2017).

<sup>37</sup> For more information about JPay, see JPay—Louisiana Department of Corrections, *available at* <http://www.jpays.com/Agency-Details/Louisiana-Department-of-Corrections.aspx> (last visited Sept. 2, 2017).

<sup>38</sup> Money Order Deposit Form, *available at* [https://jpays.com/moneyOrderForms/LA\\_Money\\_Order\\_coupon.pdf](https://jpays.com/moneyOrderForms/LA_Money_Order_coupon.pdf) (last visited Sept. 2, 2017).

<sup>39</sup> All approved money orders will be processed within ten (10) business days following receipt by JPay. The largest amount of money that can be sent via mail is \$999.99, and amounts greater than \$500 may be subject to investigation. See Money Order Deposit Form, *available at* [https://jpays.com/moneyOrderForms/LA\\_Money\\_Order\\_coupon.pdf](https://jpays.com/moneyOrderForms/LA_Money_Order_coupon.pdf) (last visited Jan. 21, 2018).

<sup>40</sup> The only exception is for purchases of hobbycrafts, or crafts made by prisoners that are available for purchase. Hobbycrafts can be purchased by money order, cash, personal check, or cashier's check sent to the prison. LA. ADMIN. CODE tit. 22, pt. I, § 313(F)(5)(b) (2017).

<sup>41</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(F)(7)(d) (2017).

<sup>42</sup> Fed. Bureau of Prisons, Inmate Information Handbook 29 (2012), *available at* [http://www.bop.gov/locations/institutions/spg/SPG\\_aohandbook.pdf](http://www.bop.gov/locations/institutions/spg/SPG_aohandbook.pdf) (last visited Jan. 21, 2018).

disciplinary proceeding (*see* Chapter 11 of the *Louisiana State Supplement*, “Prison Disciplinary Hearings,” for information about disciplinary hearings), or handed over to law enforcement officials. However, this does not apply if the warden can determine that the person receiving the mail is not fluent in English.<sup>43</sup>

### C. LEGAL CORRESPONDENCE

#### 1. Legal Communication with Courts, Public Officials, and Attorneys: Privileged Correspondence

Generally, different laws do not exist for legal and non-legal mail. For example, under the First Amendment (freedom of speech), both kinds of mail generally get the same level of protection. However, legal mail—to courts, public officials, and attorneys—is more protected because restricting this mail involves two other important concerns: your right to meaningful access to the courts and the attorney-client privilege. Mail to and from attorneys, courts, paralegals, and legal organizations is treated as privileged and receives greater protection (for instance, this mail cannot usually be censored). Mail to and from other public officials and agencies is also usually treated as privileged and given more protection than regular mail.

##### a. First Amendment Protections

Courts pay more attention to legal mail than they do to non-legal mail when they try to figure out whether restrictions are appropriate, meaning mail from your attorney may have more protections than mail from friends and family. Prisons cannot restrict mail sent to attorneys unless the government has an “important or substantial” reason for the restriction. Because mail from your attorney is considered “incoming mail,” any prison regulations on the mail have to be “reasonably related to a legitimate interest.”<sup>44</sup> That means the prison can only regulate mail if you could think of a way the restriction is related to a “legitimate” or valid interest the prison has, such as checking the mail for contraband.<sup>45</sup>

The state can require your lawyer to clearly mark his letters as coming from an attorney and can require his address be written on the envelope if the letters are supposed to be treated in a special manner. The state can also require your lawyer to identify himself to prison officials before he begins speaking with you.

Even though the Supreme Court says a prisoner does not have to be around for prison officials to open letters from an attorney to a prisoner, many other courts have said that prisons cannot open mail from an attorney unless the prisoner is either present or has been given the chance to be present. Louisiana law does not require that the prisoner be present when his mail raises suspicion, but you should otherwise be present when legal mail is opened for inspection. This is discussed more in Section C(1)(d) below.

##### b. Your Right to Meaningful Access to the Courts and Assistance of Counsel

You have a constitutional right based on the Fourteenth Amendment to meaningful court access and assistance of counsel.<sup>46</sup> Courts have stated that allowing prison officials to read mail sent by prisoners to courts or between attorneys and prisoners can prevent prisoners from telling courts about violations and harms they have been subjected to in prison.<sup>47</sup> Even if your First Amendment claim fails because prison

<sup>43</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(F)(5)(a)(v) (2017).

<sup>44</sup> *Thornburgh v. Abbott*, 490 U.S. 401, 414–419, 109 S. Ct. 1874, 1882–1885, 104 L. Ed. 2d 459, 473–477 (1989). *See also* *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 65, 79 (1987).

<sup>45</sup> *Frye v. Henderson*, 474 F.2d 1263, 1264 (5th Cir. 1973).

<sup>46</sup> *See* *Bounds v. Smith*, 430 U.S. 817, 821–825, 97 S. Ct. 1491, 1394–1397, 52 L. Ed. 2d 72, 72–81 (1977) (reviewing Supreme Court decisions that established a right of access to the courts and the assistance of counsel). *But see* *Lewis v. Casey*, 518 U.S. 343, 351, 116 S. Ct. 2174, 2180, 135 L. Ed. 2d 606, 618 (1996) (finding that a prisoner must prove that lack of necessary legal assistance or library actually hindered his legal claims). *See* Chapter 12 and Chapter 9, Part H of the main *JLM* for a full discussion of the right to effective assistance of counsel.

<sup>47</sup> *See* *Taylor v. Sterrett*, 532 F.2d 462, 476 (5th Cir. 1976) (finding that outgoing mail, generally, could not be opened and incoming mail could be opened in the inmate’s presence if there was a reasonable possibility of contraband inclusion).



officials are restricting your mail to serve an important government objective, you can still challenge the restriction if it prevents you from having meaningful court access. However, these claims will not likely succeed unless you also prove that there was some actual harm to your ability to assert a legal claim.<sup>48</sup> Also, note that your constitutional right to access the courts and legal assistance does not require that prisons provide any particular arrangements. For example, the Fifth Circuit, the appeals court that covers Louisiana, held that a prisoner who had rejected his court-appointed public defender and gotten permission to defend himself *pro se* was not constitutionally entitled to access the prison law library.<sup>49</sup>

#### c. Attorney-Client Privilege

For communications with your attorney, you are also protected by the attorney-client privilege.<sup>50</sup> This privilege allows you to refuse to share confidential communications between you and your attorney, and it also allows you to prevent any other person from sharing confidential communications between you and your attorney. It does not matter if your communications with your lawyer are written or oral; both are equally privileged and protected.<sup>51</sup> The protection that the attorney-client privilege gives you is limited in two ways. First, it may only be used to challenge the reading of your legal mail, not the physical inspection of it. Others may be allowed to look at your legal correspondence, though they may not read the contents.<sup>52</sup> Second, attorney-client privilege does not protect everything; there are exceptions. For the attorney-client privilege to apply, you must intend for the communication to be kept strictly between you and your attorney.<sup>53</sup> In other words, if you share information you discussed with your attorney to someone other than your attorney or the people like law clerks and secretaries who work with your lawyer, this information will no longer be privileged.<sup>54</sup> You also cannot claim the attorney-client privilege if the communication helps future wrongdoing.<sup>55</sup>

#### d. Legal Correspondence and Louisiana Regulations

Louisiana generally handles mail with attorney-client privilege differently from other mail. For example, prisons can reject outgoing mail that officials consider “malicious, frivolous, false, and/or inflammatory statements or information, the purpose of which is reasonably intended to harm, embarrass, or intimidate an employee, visitor, guest or offender.”<sup>56</sup> But this does not apply to legal mail. You may provide information by mail that officials might otherwise consider malicious, false, etc. if your purpose is to get legal assistance.<sup>57</sup>

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<sup>48</sup> See *Lewis v. Casey*, 518 U.S. 343, 351, 116 S. Ct. 2174, 2180, 135 L. Ed. 2d 606, 618 (1996) (per curiam) (holding the prisoner must prove his prison’s law library or legal assistance program was lacking in a way actually hindering his efforts to pursue a legal claim).

<sup>49</sup> *Degrade v. Godwin*, 84 F.3d 768, 768–769 (5th Cir. 1996) (agreeing with Supreme Court precedent, affirming “the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries *or* adequate assistance from persons trained in the law.”) (citing *Bounds v. Smith*, 430 U.S. 817, 828, 97 S. Ct. 1491, 1498, 52 L. Ed. 2d 72 (1977)).

<sup>50</sup> LA. CODE EVID. ANN. art. 506 (2017).

<sup>51</sup> LA. CODE EVID. ANN. art. 506(B) (2017).

<sup>52</sup> *Frye v. Henderson*, 474 F.2d 1263, 1264 (5th Cir. 1973) (per curiam) (stating opening mail to check for contraband is a legitimate prison policy and “does not deny any federally-protected right that prisoners have.”).

<sup>53</sup> *United States v. Robinson*, 121 F.3d 971, 976 (5th Cir. 1997) (finding that a meeting between a prisoner and a potential attorney, or a meeting that “take[s] place away from public view,” is not enough to prove that the prisoner intended the communication to be confidential).

<sup>54</sup> LA. CODE EVID. ANN. art. 506(B)(2) (2017).

<sup>55</sup> LA. CODE EVID. ANN. art. 506(C)(b) (2017).

<sup>56</sup> However, the law also says that the restriction of your communication cannot be based solely on “unwelcome or unflattering opinions” that you express about the prison and its officials. LA. ADMIN. CODE tit. 22, pt. I, § 313(F)(5)(c) (2017).

<sup>57</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(F)(5)(c) (2017).

Outgoing privileged mail envelopes have to be marked in the same way as other mail,<sup>58</sup> but you are allowed to seal the envelope and officials may not open it for inspection.<sup>59</sup> There is an exception for outgoing privileged mail that raises suspicion. A warden or deputy warden can open and inspect incoming and outgoing privileged mail outside your presence if (1) letters look unusual or seem different from mail normally received or sent by the individual or public entity; (2) letters are a different size or shape than those normally received or sent by the individual or public entity; (3) letters have a city and/or state postmark that is different from the return address; (4) letters are leaking, stained, or emitting a strange or unusual smell or have a powdery residue; (5) prison officials have reasonable suspicion that illegal activity is occurring and their suspicion has led to an authorized formal investigation.<sup>60</sup>

Prison officials have an interest in preventing the entrance of contraband into the prison. As a result, incoming mail is more likely to be allowed to be inspected than is outgoing mail. All incoming privileged correspondence is opened in your presence to check for contraband and for material that is not privileged.<sup>61</sup> If you receive a privileged mailing that is sealed in a way that prevents inspection of the document inside the mailing, you have a choice. You can choose to allow staff to take it apart and inspect the document, or you can choose to return the mailing to the sender and ask them to resend it in a looser way to allow for inspection.<sup>62</sup> You may receive legal materials on a CD, or compact disc. However, you have the option of either returning the disc to the sender so the sender can make paper copies, or you can pay the prison to make paper copies for you.<sup>63</sup>

When inspected material contains correspondence that does not seem to be entitled to privilege or seems to require further inspection because of its unusual appearance, as described above, it “may be restricted, confiscated, returned to the sender, kept for further investigation, referred for disciplinary proceedings or forwarded to law enforcement officials.”<sup>64</sup> If cash, checks, or money orders are found, they will be forwarded to the business office to confirm that the transaction is legitimate.<sup>65</sup>

If your mail is rejected, you should “be notified within three working days, in writing, of the correspondence rejection” and the reason for rejection. Like with non-privileged mail, you will have seven days to decide what you want done with the letter, and you may use procedures your prison has set up to deal with prisoner complaints to appeal the rejection.<sup>66</sup> “If privileged correspondence is opened accidentally outside [your presence], the envelope will be immediately stapled or taped closed and marked “accidentally opened” along with the date and employee’s initials.” The employee will also be required to file an unusual occurrence report.<sup>67</sup>

#### D. INTERNET COMMUNICATION

The right of a prisoner to access the Internet, whether directly or indirectly, is a relatively new subject, since the Internet has only recently become common in day-to-day life. Therefore, there are not many cases about the extent to which a prisoner has a right to communicate through the Internet. However,

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<sup>58</sup> All outgoing privileged correspondence shall include: a complete legible name and address of the receiving party and the sender’s name, DOC number, housing unit, and the institution’s address on the envelope’s upper left corner. Anything other than return and sending address, is not permitted. All outgoing privileged correspondence shall be stamped in the mailroom, indicating it comes from a correctional institution. LA. ADMIN. CODE tit. 22, pt. I, § 313(F)(9)(a), (b) (2017).

<sup>59</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(F)(9)(c) (2017).

<sup>60</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(F)(11) (2017).

<sup>61</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(F)(10)(a) (2017).

<sup>62</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(F)(10)(a) (2017).

<sup>63</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(F)(10)(a) (2017).

<sup>64</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(F)(10)(b)(ii) (2017).

<sup>65</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(F)(10)(b)(i) (2017).

<sup>66</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(F)(10)(b)(iii) (2017).

<sup>67</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(F)(10)(b)(iv) (2017).

any prison regulation that controls how you are allowed to communicate over the Internet still has to be reasonably related to a legitimate prison interest.<sup>68</sup>

Most, if not all, states ban prisoners from direct, unsupervised access to the Internet.<sup>69</sup>

### E. RECEIPT AND POSSESSION OF PUBLICATIONS

You have a First Amendment right to receive publications, and a publisher has a First Amendment right to send you publications. However, restrictions of this right are valid if they are reasonably related to a legitimate prison interest (the *Turner* standard).<sup>70</sup> The Supreme Court has said that when a court is deciding whether a restriction is reasonably related to a legitimate prison interest, it should take into consideration why the correction official imposed the restriction.<sup>71</sup> Courts don't like to second guess prison employees that say they are acting in the interests of prison safety or other legitimate prison interests. This means that it will be relatively easy for officials to restrict access to publications. However, censorship is not allowed just because the publication's content is unpopular or offensive.<sup>72</sup>

Louisiana prisons restrict your access to publications when it interferes with a legitimate penological objective (interests related to the treatment of prisoners) such as "deterrence of crime, rehabilitation of offenders, maintenance of internal/external security of an institution, or maintenance of an environment free of sexual harassment."<sup>73</sup> A publication is defined as a "book, booklet, pamphlet, or similar document, or a single issue of a magazine, periodical, newsletter, newspaper, magazine/newspaper clipping, article printed from the internet, plus other materials addressed to a specific offender such as advertising brochures, flyers and catalogs."<sup>74</sup> Publications are inspected for contraband like any other mail you receive. They are also subject to restrictions on the type of content they may contain.

#### 1. General Standards for Receiving Publications

Generally, all printed materials must be received directly from the publisher.<sup>75</sup> An exception to this rule is that you can receive newspaper and magazine clippings (or copies thereof) from someone who is not the publisher.<sup>76</sup> You may not receive multiple copies of the same publication, and any samples contained inside will be removed.<sup>77</sup> You may not receive more than five clippings in a mailing, and copies of the same clipping are not allowed. The prison may reduce the number of clippings you can receive, if necessary, to ensure timely review of all mail. It might take longer for the mail to get to you if it contains multiple clippings.<sup>78</sup> Materials that may pose a security risk include the following:<sup>79</sup>

- 1) Maps, road atlases, etc. that show a geographic region that could be interpreted to be a threat to security;
- 2) Writings that call for, assist in or are evidence of criminal activity or facility misconduct;
- 3) Instruction regarding the ingredients or manufacture of intoxicating beverages or drugs;

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<sup>68</sup> *Thornburgh v. Abbott*, 490 U.S. 401, 404, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459, 467 (1989) ("[R]egulations are valid if they are reasonably related to legitimate penological interests.") (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

<sup>69</sup> See Titia A. Holtz, Note, *Reaching Out from Behind Bars: The Constitutionality of Laws Barring Prisoners from the Internet*, 67 BROOK. L. REV. 855, 898 (2002).

<sup>70</sup> *Thornburgh v. Abbott*, 490 U.S. 401, 404, 109 S. Ct. 1874, 1877, 104 L. Ed. 2d 459, 467 (1989) (citing *Turner v. Safley*, 482 U.S. 78, 89–90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79 (1987)).

<sup>71</sup> See *Thornburgh v. Abbott*, 490 U.S. 401, 418, 109 S. Ct. 1874, 1884, 104 L. Ed. 2d 459, 476 (1989) (quoting *Turner v. Safley*, 482 U.S. 78, 90, 107 S. Ct. 2254, 2263, 96 L. Ed. 2d 64, 80 (1987)).

<sup>72</sup> See *Thornburgh v. Abbott*, 490 U.S. 401, 415–416, 109 S. Ct. 1874, 1882–1883, 104 L. Ed. 2d 459, 474 (1989).

<sup>73</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(D) (2017).

<sup>74</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(E) (2017).

<sup>75</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(G)(1) (2017).

<sup>76</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(G)(2) (2017).

<sup>77</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(G)(1) (2017).

<sup>78</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(G)(2) (2017).

<sup>79</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(G)(3)(a) (2017).

- 4) Information regarding the introduction of, or instructions in the use, manufacture, storage, or replication of, weapons, explosives, incendiaries, escape devices or other contraband;
- 5) Instructions in the use of martial arts;
- 6) Racially inflammatory material or material that could cause a threat to the offender population, staff, and security of the facility<sup>80</sup>;
- 7) Writings calling for violence or creating a danger within a correctional facility; and
- 8) Sexually explicit material (discussed in Section E(2) below).

All publications are sorted into three categories according to how closely they need to be examined. The warden can add or remove publications from categories as he sees fit.<sup>81</sup> Category 3 materials are assumed to be acceptable. They will usually be delivered to you without a problem. Category 2 materials require a case-by-case determination by the regional warden.<sup>82</sup> They will be forwarded to him for his review before they can be delivered to you. Category 1 publications are assumed to be unacceptable.<sup>83</sup> Whenever the prison receives a Category 2 publication addressed to you, you will receive a notice telling you that the item is being reviewed.<sup>84</sup> If the item is rejected, you will receive a notice stating the reasons for rejection. At that point, you have seven days to appeal the rejection through the agency (the Louisiana Department of Corrections) itself before you can bring the case to a court.<sup>85</sup> The item will be held until the issue is resolved.<sup>86</sup>

Photographs and other pictures created by digital imaging devices, such as digital cameras and medical imaging equipment, are subject to specific rules. For example, the prison might reject hard-back and laminated photos, as well as digital or other images that it decides interfere with prison goals.<sup>87</sup> To meet the prison requirements, images should cover any private areas of any person shown.<sup>88</sup> Photos of people wearing lingerie are normally unacceptable. Swimsuits may be acceptable if the overall context of the picture is “reasonably related” to an activity where people normally wear swimsuits.<sup>89</sup> A suggestive pose, regardless of the clothing worn in the picture, may be enough for the item to be rejected.<sup>90</sup> The prison has to inform you if pictures sent to you are rejected. If they are rejected, you have the same right to appeal the rejection through the agency (the Louisiana Department of Corrections).<sup>91</sup>

## 2. Receiving Sexually Explicit Materials

Prisoners in Louisiana are not allowed to receive sexually explicit materials. Publications that depict sexually explicit material are completely banned. Specific issues of other publications may be rejected if they use these types of images.<sup>92</sup> The law discusses specific security concerns associated with sexually explicit materials, such as the threat of non-consensual sex, harassment, or molestation of other prisoners or staff.<sup>93</sup> In addition, sexually explicit material often portrays women, and sometimes men, in disrespectful ways that could lead to sexual harassment of female employees.<sup>94</sup> Finally, it is impossible to control who sees the material once it enters the prison population. Courts have said that if an incarcerated sex offender

<sup>80</sup> See, e.g. *Chriceol v. Phillips*, 169 F.3d 313, 315–317 (5th Cir. 1999) (confirming that federal courts, relying on *Abbott*, have upheld the withholding of publications that contain racist statements).

<sup>81</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(G)(3)(d) (2017).

<sup>82</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(G)(3)(e) (2017).

<sup>83</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(G)(3)(c)(i) (2017).

<sup>84</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(G)(3)(e) (2017).

<sup>85</sup> See LA. ADMIN. CODE tit. 22, pt. I, § 313(G)(3)(f) (2017).

<sup>86</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(G)(3)(f) (2017).

<sup>87</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(H)(1) (2017).

<sup>88</sup> See LA. ADMIN. CODE tit. 22, pt. I, § 313(H)(1) (2017) (stating that images may not “expose the genitals, genital area (including pubic hair), anal area, cheeks of the buttocks or female breasts (or breasts which are designed to imitate female breasts) [and t]hese areas must be covered with garments which cannot be seen through”).

<sup>89</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(H)(2) (2017).

<sup>90</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(H)(2) (2017).

<sup>91</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(H)(6) (2017).

<sup>92</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(G)(3)(b)(iv) (2017).

<sup>93</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(G)(3)(b)(i) (2017).

<sup>94</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(G)(3)(b)(ii) (2017).

views the material, it may encourage deviant sexual behavior and interfere with the prison's attempts to rehabilitate the prisoner.<sup>95</sup>

## F. ACCESS TO NEWS MEDIA

You may want to publicize your case by attracting the media's attention. The Supreme Court has held that a reasonable and effective means of communication between prisoners and the media must exist.<sup>96</sup> But prisons have a security interest in limiting access to visitors, including the press.<sup>97</sup> The court held that limiting or prohibiting face-to-face interviews with the press does not violate the First Amendment as long as prisoners can still communicate with the press through writing or visitations.<sup>98</sup> In *Houchins v. KQED*, the Supreme Court repeated that freedom of the press does not grant the media special access to prisons.<sup>99</sup> Therefore, the media can be restricted from physical access (through visitation, tours, photographs, etc.) just like the public can.

In Louisiana, if a news organization wants to interview you, it must contact the prison directly.<sup>100</sup> Generally the prison will allow interviews related to your involvement in facility programming, such as treatment and vocational services.<sup>101</sup> The prison will probably not allow a member of the press to interview you about the details of the crime for which you were convicted.<sup>102</sup> To be eligible for an interview, you must be in the general population of the prison, meaning you cannot be in the initial reception stage or in protective custody.<sup>103</sup> You must agree to the interview, and you cannot be paid for the interview.<sup>104</sup>

There are not many cases about media interviews with Louisiana prisoners. However, you should remember that prisons have a lot of freedom to regulate communication, as long as the regulations are reasonably related to a legitimate penological interest. Louisiana law names some specific times when a warden can deny an interview request, including pending court action, a prisoner's health, or a media organization's past rule breaking.<sup>105</sup>

You can read more about the rules for interviews with news organizations in LA. ADMIN. CODE tit. 22, pt. I, § 339 (2017). There is also information regarding non-news media, such as independent filmmakers and non-news magazines.

## G. VISITATION AND PHONE CALLS

### 1. Visitation

Convicted prisoners' constitutional rights to visitation, or official visits to the prisoner, may be severely restricted, however prisoners who have not yet gone to trial are almost certainly allowed reasonable visitation rights,<sup>106</sup> since lack of access to visitors like attorneys can violate the rights to a fair trial and

<sup>95</sup> LA. ADMIN. CODE tit. 22, pt. I, § 313(G)(3)(b)(iii) (2017).

<sup>96</sup> *Pell v. Procunier*, 417 U.S. 817, 826, 94 S. Ct. 2800, 2806, 41 L. Ed. 2d 495, 503–504 (1974).

<sup>97</sup> *See Pell v. Procunier*, 417 U.S. 817, 826, 94 S. Ct. 2800, 2806, 41 L. Ed. 2d 495, 503–504 (1974); *see also Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850, 94 S. Ct. 2811, 2815, 41 L. Ed. 2d 514, 519–520 (1974) (finding that under the Federal Bureau of Prisons regulations, the media does not have the right to access prisons and inmates beyond the rights granted to members of the general public. *Saxbe* differs from *Pell* in that *Saxbe* only looks at the rights of the media, while *Pell* also addresses the rights of prisoners to communicate with the media).

<sup>98</sup> *See Pell v. Procunier*, 417 U.S. 817, 824–825, 94 S. Ct. 2800, 2085, 41 L. Ed. 2d 495, 503 (1974) (allowing prisoners face-to-face visits with members of their family, their clergy, their attorneys, and friends or prior acquaintance).

<sup>99</sup> *Houchins v. KQED*, 438 U.S. 1, 16, 98 S. Ct. 2588, 2597, 57 L. Ed. 2d 553, 565 (1978).

<sup>100</sup> LA. ADMIN. CODE tit. 22, pt. I, § 339(H)(1) (2017).

<sup>101</sup> LA. ADMIN. CODE tit. 22, pt. I, § 339(H)(2) (2017).

<sup>102</sup> LA. ADMIN. CODE tit. 22, pt. I, § 339(H)(2) (2017).

<sup>103</sup> LA. ADMIN. CODE tit. 22, pt. I, § 339(H)(3)(a) (2017).

<sup>104</sup> LA. ADMIN. CODE tit. 22, pt. I, §§ 339(H)(3)(b)–(c) (2017).

<sup>105</sup> LA. ADMIN. CODE tit. 22, pt. I, § 339(H)(6) (2017).

<sup>106</sup> *See Jones v. Diamond*, 594 F.2d 997, 1013–1014 (5th Cir. 1979), *on reh'g*, 636 F.2d 1364 (1981).

legal advice.<sup>107</sup> In *Overton v. Bazzetta*, the Supreme Court discussed a prisoner's constitutional right to visits as part of the First Amendment freedom of association, or freedom of relationships. The court said that a rule limiting visits was connected to the interest of security and therefore not a violation of the prisoner's rights.<sup>108</sup> Regardless of the type of prisoner, visitation rights may be restricted to promote institutional administration (running the prison), security, and rehabilitation.<sup>109</sup> Prison officials may regulate the time, place, and manner of visits, though such regulations, at least regarding pretrial detainees, must be reasonable. Prison officials may also restrict some of the rights of visitors. These restrictions, however, must still be reasonably related to a legitimate prison interest, otherwise courts can strike them down. Contact visits are not constitutionally required for pretrial detainees or for prisoners.<sup>110</sup>

## 2. Rules for Who May Visit

Prisoners in Louisiana correctional facilities may keep a list of up to ten authorized guests,<sup>111</sup> who must be cleared by the correctional facility. You must provide applications to anyone you want on your visitation list. You must fill out their name, address, date of birth, race, and sex, and then send the application to them to complete and mail back to the facility.<sup>112</sup> Each of your listed visitors will also be subject to a criminal background check before they are allowed to visit you in prison. If that background check reveals a warrant for that person's arrest, the prison must report them to the police.<sup>113</sup> You will be notified once the visitation application has been approved or denied.<sup>114</sup> You may make changes to your list every four months.<sup>115</sup>

There are a few categories of persons who are not allowed to visit or may visit only under certain circumstances or with permission of the warden. These categories are:<sup>116</sup>

- 1) Individuals convicted of or with pending criminal charges for crimes involving contraband, explosives, or escape from a correctional facility.
- 2) The direct victims of your crime(s) cannot visit you, except in accordance with an established policy. The warden can waive this on a case-by-case basis.
- 3) Ex-prisoners must have been formally discharged from prison or from probation/parole for two years with no criminal record during that time. No one with three or more felony convictions in the last five years may visit.
- 4) Visits from staff or former employees of the prison are generally denied unless they are a member of your family. The warden may waive this.

If you have been convicted of a sex offense or have a documented history of sex abuse, your visits with minor children may be restricted. The strictest rules in this area are for prisoners convicted of sex

<sup>107</sup> See *Procunier v. Martinez*, 416 U.S. 396, 419, 94 S. Ct. 1800, 1814, 40 L. Ed. 2d 224, 243 (1974) (“[I]nmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.”).

<sup>108</sup> *Overton v. Bazzetta*, 539 U.S. 126, 131–132, 123 S. Ct. 2162, 2167, 156 L. Ed. 2d 162, 170 (2003) (“We need not attempt to explore or define the asserted right of association at any length or determine the extent to which it survives incarceration because the challenged regulations bear a rational relation to legitimate penological interests. This suffices to sustain the regulation in question.”).

<sup>109</sup> See *Overton v. Bazzetta*, 539 U.S. 126, 129, 123 S. Ct. 2162, 2166, 156 L. Ed. 2d 162, 168 (2003) (finding that rehabilitation, maintenance of basic order, and prevention of violence are legitimate objectives of the correctional system); *Pell v. Procunier*, 417 U.S. 817, 822, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495, 501 (1974) (finding that a prisoner keeps First Amendment rights that are consistent with legitimate penological objectives).

<sup>110</sup> See *Block v. Rutherford*, 468 U.S. 576, 589, 104 S. Ct. 3227, 3234, 82 L. Ed. 2d 438, 449 (1984) (holding contact visits are a privilege, not a right, and that visits can be denied because of security concerns).

<sup>111</sup> This number can be increased to up to fifteen visitors at the warden's discretion. LA. ADMIN. CODE tit. 22, pt. I, § 316(J)(1)(b) (2017).

<sup>112</sup> LA. ADMIN. CODE tit. 22, pt. I, § 316(G)(1) (2017).

<sup>113</sup> LA. ADMIN. CODE tit. 22, pt. I, § 316(G)(2) (2017).

<sup>114</sup> LA. ADMIN. CODE tit. 22, pt. I, § 316(G)(3) (2017).

<sup>115</sup> LA. ADMIN. CODE tit. 22, pt. I, § 316(J)(2)(a) (2017).

<sup>116</sup> LA. ADMIN. CODE tit. 22, pt. I, § 316(H)(2) (2017).

offenses against minor children who are members of their family. These prisoners may not have any minor child visit them, including their own biological children.<sup>117</sup> Prisoners convicted of sex offenses against children not in their family are also generally denied minor child visitors, but the warden may make an exception for the prisoner's biological children if the child's legal guardian submits a written request.<sup>118</sup> The legal guardian or someone named by the legal guardian must accompany the child, and the visits may be contact or non-contact, according to the warden's decision.<sup>119</sup>

There are other rules governing visitation. These rules set the conditions of the visit, how often visitors are allowed, and how visitors must dress, among other topics. If you plan to invite visitors, you should familiarize yourself with these rules<sup>120</sup> and any other regulations in your handbook.

### 3. Using Telephones

The Louisiana Electronic Surveillance Act (LESA) generally bans the interception and disclosure of wire, oral, and electronic communications.<sup>121</sup> This means that if your phone conversation is wiretapped, you may be able to file a Motion to Suppress (a request made to the judge to keep the conversation out of your trial) to keep the conversation from being used as evidence against you. Because LESA was written to match a federal rule, Title III's Omnibus Crime Control and Safe Streets Act, the federal law can help understand LESA when the language of both laws is similar.<sup>122</sup> However, Louisiana courts have found that two important exceptions apply. First, an intercepted conversation may be used at trial if it was recorded "by an investigative or law enforcement officer in the ordinary course of his duties."<sup>123</sup> The second exception is if you consented, or agreed, to the recording.<sup>124</sup> Consent may be express or implied. Consent is express, for example, if you agreed to allow a phone conversation to be recorded in writing. Consent may also be implied, if a reasonable person would understand that his conversation was being recorded and did nothing to stop the recording. Courts have held that even if a prisoner showed a subjective expectation of privacy, meaning that he acted as though he believed the call was not recorded, it is not enough because courts have said that society does not recognize that prisoners have a reasonable expectation of privacy, or a right to be left alone, in their cells.<sup>125</sup>

In Louisiana prisons, all calls are recorded and may be monitored.<sup>126</sup> Because the prison posts signs and plays a recorded message telling both people on the phone that the call is being recorded, your use of the telephone is considered consent to the recording.<sup>127</sup> You also consent in writing when you first arrive at the prison and are processed.<sup>128</sup> This consent includes legal calls.<sup>129</sup> Though your legal calls are recorded, monitoring calls with your designated attorney requires the warden's consent.

You are allowed to keep a master list of up to twenty phone numbers to call, including numbers for family, friends, and legal calls. That list will be programmed into the prison telephone system, which you can access with your PIN.<sup>130</sup> You cannot share space on your master list with other prisoners, meaning you

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<sup>117</sup> LA. ADMIN. CODE tit. 22, pt. I, § 316(I)(1)(a) (2017).

<sup>118</sup> LA. ADMIN. CODE tit. 22, pt. I, § 316(I)(1)(b) (2017).

<sup>119</sup> LA. ADMIN. CODE tit. 22, pt. I, § 316(I)(1)(b) (2017). Minor spouses, emancipated minors, and minors participating in an institutional program are exempt from the requirement that minors be accompanied by a guardian. LA. ADMIN. CODE tit. 22, pt. I, § 316(J)(1)(d) (2017).

<sup>120</sup> LA. ADMIN. CODE tit. 22, pt. I, § 316(K) (2017).

<sup>121</sup> LA. REV. STAT. ANN. § 15:1303 (2017).

<sup>122</sup> *Keller v. Aymond*, 98-884, p. 7 (La. App. 3 Cir. 12/23/98); 722 So. 2d 1224, 1227.

<sup>123</sup> LA. REV. STAT. ANN. § 15:1302(10)(a)(ii) (2017).

<sup>124</sup> LA. REV. STAT. ANN. § 15:1303(C)(3) (2017).

<sup>125</sup> *State v. Favors*, 09-1034, pp. 15–16 (La. App. 5 Cir. 6/29/10); 43 So. 3d 253, 259–260.

<sup>126</sup> LA. ADMIN. CODE tit. 22, pt. I, § 315(D)(1)(d) (2017).

<sup>127</sup> LA. ADMIN. CODE tit. 22, pt. I, § 315(D)(1)(e)–(g) (2017).

<sup>128</sup> LA. ADMIN. CODE tit. 22, pt. I, § 315(D)(6)(e) (2017).

<sup>129</sup> LA. ADMIN. CODE tit. 22, pt. I, § 315(D)(1)(d) (2017).

<sup>130</sup> LA. ADMIN. CODE tit. 22, pt. I, §§ 315(D)(1)(a)–(b) (2017).

are not allowed to program another prisoner's family member into your master list unless that person is also your family member.<sup>131</sup> People on your list can ask not to receive calls from you.<sup>132</sup>

You should check your prisoner handbook for the times of day that you may make calls, because this can be different at every prison. Time limits on phone calls may also be in place at your institution. If you are in a maximum-security prison, you may face more restrictions than prisoners at minimum- or medium-security prisons. You may also face additional restrictions based on your offender status, or how the prison system ranks you on its scale of risk for dangerousness or rule-breaking.<sup>133</sup> A staff member may grant emergency calls on a case-by-case basis.<sup>134</sup> For emergency notifications coming from your family to you, the chaplain is normally responsible for relaying the message.<sup>135</sup> The chaplain is also responsible for notifying your family if you are seriously ill, but he has discretion in doing so.<sup>136</sup> Non-emergency messages are not accepted.<sup>137</sup>

If you are hearing impaired, the prison will provide you with hearing aids or services to help you use the telephone.<sup>138</sup>

## H. CONCLUSION

Limitations on your right to communicate with the outside world, as discussed in this Chapter, may be among the most frustrating restrictions you have to face. In most circumstances, prison authorities have great discretion, or choice, to restrict your right to communicate based on the way they think your communication affects penological, or disciplinary, interests. If you feel the discretion prison officials exercise is not reasonably related to a legitimate prison interest, and therefore violates your constitutional rights, you may want to challenge the restriction or its application to you, but you should be careful that your claim does not appear frivolous (lacking in legal basis or having very little chance of success).<sup>139</sup>

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<sup>131</sup> LA. ADMIN. CODE tit. 22, pt. I, § 315(D)(1)(b) (2017).

<sup>132</sup> LA. ADMIN. CODE tit. 22, pt. I, § 315(D)(1)(h) (2017).

<sup>133</sup> LA. ADMIN. CODE tit. 22, pt. I, § 315(D)(3)(a) (2017).

<sup>134</sup> LA. ADMIN. CODE tit. 22, pt. I, § 315(D)(2)(b) (2017); LA. ADMIN. CODE tit. 22, pt. I, § 315(D)(3)(b) (2017).

<sup>135</sup> LA. ADMIN. CODE tit. 22, pt. I, § 315(D)(5)(a) (2017).

<sup>136</sup> LA. ADMIN. CODE tit. 22, pt. I, § 315(D)(5)(b)–(c) (2017).

<sup>137</sup> LA. ADMIN. CODE tit. 22, pt. I, § 315(D)(4)(a) (2017).

<sup>138</sup> LA. ADMIN. CODE tit. 22, pt. I, § 312(C) (2017).

<sup>139</sup> The Prison Litigation Reform Act (PLRA) has a “three strikes” provision requiring prisoners to pay court costs if three of their suits have been dismissed as frivolous (wasteful) or as failing to state a claim. So, proceed carefully, using this chapter as a guide to the difference between successful and unsuccessful suits. For more information on the PLRA, see Chapter 14 of the main *JLM*.



# CHAPTER 14: YOUR RIGHT TO ADEQUATE MEDICAL CARE

## A. INTRODUCTION

This chapter explains your right to medical care as a Louisiana prisoner under Louisiana state law. All Louisiana prisons also have to follow federal law. Federal law on adequate medical care is explained in Chapter 23 of the main *JLM* (“Your Right to Adequate Medical Care”) with some specific issues explained in other chapters of the main *JLM*: Chapter 29, “Special Issues for Prisoners with Mental Illness,” Chapter 26, “Infectious Diseases: AIDS, Hepatitis, and Tuberculosis in Prisons,” and Chapter 28, “Rights of Prisoners with Disabilities.” You should read Chapter 23, and any of the other chapters mentioned above that may affect you, to learn about your right to medical care under federal law. This chapter will only deal with the state law of Louisiana.

Part B of this chapter explains that the state must provide all prisoners with medical facilities within the prison, or transfer prisoners to medical facilities outside of the prison. Part B also explains that although the state is required to pay for your medical treatment, you may have to pay a copayment. Finally, Part B describes how your stay at a hospital or medical facility will count against how long you have to stay in prison.

Next, Part C explains the standard of “reasonable care” in more detail. Federal law requires medical facilities to treat you with “reasonable care.” Part C gives some examples of cases where courts thought that the medical officials did give reasonable care. It also gives examples of cases where the courts thought there was no reasonable care. If you do not get reasonable medical care, the state may be liable to you.

Finally, Part D explains that you may be required to be tested for infectious diseases. All Louisiana prisons must test prisoners for tuberculosis. They might also have to test you for diseases if you do certain things, like bite or throw bodily fluids at somebody else.

## B. DUTY TO PROVIDE REASONABLE MEDICAL CARE

### 1. Provision of Hospital Quarters in Prison

Louisiana law says that the government has a duty to provide every prisoner with reasonable medical care. Reasonable medical care includes hospital quarters, health, medical, and dental services.<sup>1</sup> The City-Parish in which your prison is located also has a duty to provide for physicians or health care providers to treat prisoners.<sup>2</sup> Each prison does not have to have its own full hospital, but prisons should be prepared for the risk that prisoners will be injured and will need life-saving medical care.<sup>3</sup> If prisons are not prepared for this risk, and you get injured or sick and do not get adequate medical care, the

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<sup>1</sup> LA. REV. STAT. § 15:760 (2017) (“Where large numbers of prisoners are confined the proper authorities in charge shall provide hospital quarters with necessary arrangement, conveniences, attendants, etc.”); *Elsev v. Sheriff of Parrish of East Baton Rouge*, 435 So. 2d 1104, 1106 (La. App. 1 Cir. 1983), *writ denied*, 440 So. 2d 762 (La. 1983) (stating that LA. REV. STAT. § 15:760 applies to all prisons, jails, and lockups in Louisiana); LA. REV. STAT. § 15:831 (2017) (“The secretary of the Department of Public Safety and Corrections shall establish and shall prescribe standards for health, medical, and dental services for each institution, including preventive, diagnostic, and therapeutic measures on both an outpatient and a hospital basis, for all types of patients.”); *see also* *Moreau v. State*, 333 So. 2d 281, 283 (La. App. 1 Cir. 1976) (“The [state] has certain statutory duties to provide medical care to prisoners.”) (citing statutes).

<sup>2</sup> LA. REV. STAT. § 15:703 (A), (B) (2017) (“The governing authority of each parish shall appoint annually a physician who shall attend the prisoners who are confined in parish jails whenever they are sick . . . . In lieu of appointing a physician, the governing authority of any parish may enter into a contract with a health care provider, licensed or regulated by the laws of this state, to provide requisite health care services, as required in this Section.”).

<sup>3</sup> *Moreau v. State*, 333 So. 2d 281, 284 (La. App. 1 Cir. 1976) (“The duty [to provide reasonable medical care] does not require the [state] to maintain a full hospital at the site of each of its prisons in order to protect the prisoners against every known medical risk. However, the duty does encompass the risk . . . that an inmate would be injured and require life-saving medical attention.”); *see also* *Elsev v. Sheriff of Parrish of East Baton Rouge*, 435 So. 2d 1104, 1106 (La. App. 1 Cir. 1983) (citing *Moreau v. State*, 333 So. 2d 281 (La. App. 1 Cir. 1976), for the same rule).

government may be liable to you.<sup>4</sup>

The services in the prison must meet certain requirements. The doctors or paramedics who work for the prison must be able to recognize when you have an emergency. They must then be able to give you the right treatment or to transfer you to a hospital or treatment center.<sup>5</sup> If the doctors or paramedics do not treat or transfer you when they should have, then a court would say the prison is liable to you. But, if it was reasonable for the doctors or paramedics not to recognize that there was an emergency, the government may not be liable for giving you inadequate treatment.<sup>6</sup> A court will determine if it was reasonable for the doctors and paramedics to miss the emergency by looking at what other doctors would have done if they had the same patient.<sup>7</sup>

Sometimes, the jail or prison has written guidelines that they have to follow for certain medical situations. Courts will ask if these guidelines apply to your situation. If they do apply, courts will then ask if they were followed.<sup>8</sup>

## 2. Transfers to Outside Medical Treatment Facilities

Louisiana law only requires your jail, prison, or lockup to have hospital facilities if there are a large number of prisoners confined there.<sup>9</sup> If there are only a small number of prisoners confined in your prison, there may be no hospital or medical treatment facility within the prison itself.

If you get sick or injured and your prison does not have the medical facilities to treat you properly, the government must transfer you to a hospital or another medical facility where you can get proper care.<sup>10</sup> Prison officials can also choose to transfer you to outside medical facilities if they think it is necessary.<sup>11</sup> Like the medical facilities in the prison, the outside medical facilities must be able to give you reasonable medical care.<sup>12</sup> Otherwise, the government may be liable to you.<sup>13</sup>

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<sup>4</sup> *Moreau v. State*, 333 So. 2d 281, 284 (La. App. 1 Cir. 1976) (finding the state liable when the prisoner was stabbed and eventually died because the prison hospital could not provide life-saving care for him).

<sup>5</sup> *Moreau v. State*, 333 So. 2d 281, 283 (La. App. 1 Cir. 1976) (stating the prison should have recognized a medical emergency after prisoner was stabbed).

<sup>6</sup> *Cole v. Acadia Parrish Sheriff's Dep't.*, 07-1386, p.10 (La. App. 3 Cir. 11/5/08); 998 So. 2d 212, 227 (finding that the state is not liable when prison physicians may not reasonably have recognized an emergency, as in this case where prisoner was treated for tooth pain without prison paramedics recognizing that it was a serious infection).

<sup>7</sup> *Cole v. Acadia Parrish Sheriff's Dep't.*, 07-1386, pp.12–21 (La. App. 3 Cir. 11/5/08); 998 So. 2d 212, 217–221 (listing what other physicians and medical experts thought of the medical situation).

<sup>8</sup> *Cole v. Acadia Parrish Sheriff's Dep't.*, 07-1386, p.23–29 (La. App. 3 Cir. 11/5/08); 998 So. 2d 212, 221–223 (listing guidelines followed by the jail and finding that they had not been violated). The court can also look at expert testimony as to whether the jail followed the written guidelines. *Cole v. Acadia Parrish Sheriff's Dep't.*, 07-1386, p.30–31 (La. App. 3 Cir. 11/5/08); 998 So. 2d 212, 223–224 (considering expert testimony from certified peace officer with bachelor's degree in Criminal Justice).

<sup>9</sup> LA. REV. STAT. § 15:760 (2017) (“Where large numbers of prisoners are confined the proper authorities in charge shall provide hospital quarters with necessary arrangement, conveniences, attendants, etc.”).

<sup>10</sup> *State v. Brouillette*, 163 La. 46, 49, 111 So. 491, 492 (La. 1927) (“And although the law does not require that hospital quarters should be provided in prisons, unless where ‘large numbers’ of prisoners are confined, yet this surely does not mean, in this humane age, that where there are only *small numbers* of prisoners confined, such prisoners are to receive no adequate care and attention should they happen to become ill. Hence . . . where a prisoner falls ill in a prison which is not provided with proper hospital facilities, it follows that a humane judge and sheriff . . . have no other recourse but to use the hospital facilities nearest at hand; for a prisoner is no more to be done to death through neglect than by ill treatment.”); *Jacoby v. State*, 434 So. 2d 570, 573 (La. App. 1 Cir. 1983) (“If these medical services are not available on the premises, it is the duty of the confining authority to transfer a sick prisoner to a medical facility for appropriate treatment.”).

<sup>11</sup> LA. REV. STAT. §15:831(A) (2017) (“An inmate may be taken to a medical facility outside the institution when deemed necessary by the director.”).

<sup>12</sup> *Jacoby v. State*, 434 So. 2d 570, 573 (La. App. 1 Cir. 1983) (“The standard of care imposed upon the confining authority [here, an outside medical facility] in providing for the medical needs of prisoners is that those services be adequate and reasonable.”).

<sup>13</sup> *Jacoby v. State*, 434 So. 2d 570, 573–574 (La. App. 1 Cir. 1983) (“If the confining authority fails to provide reasonable medical services and treatment, an inmate has a civil rights action pursuant to [42 U.S.C. § 1983 (2012)] to secure such care.”). For more on 42 U.S.C. § 1983 (2012) and how to use it to bring a federal civil rights action, *see*

### 3. Payment for Medical Services and Hospitalization

The City-Parish must pay for medical services and treatments that you receive while you are in prison.<sup>14</sup> If you are transferred to a hospital for *necessary* treatment, the City-Parish should pay for your stay in the hospital.<sup>15</sup> However, there are some procedures that the government does not have to pay for. These include organ transplants or cosmetic medical treatments. The government will pay for these procedures if they are necessary because of something the Department of Public Safety and Corrections is responsible for (such as an accident).<sup>16</sup> Although the government has to pay for your medical services, you may have to pay a copayment. The amount of your copayment will depend on how much you can afford to pay.<sup>17</sup> These copayments can be taken out of your drawing or savings account, according to written guidelines established by the secretary of the Department of Public Safety and Corrections.<sup>18</sup>

### 4. Effect of Hospitalization on Sentencing

If you are hospitalized, the number of days you spend in the hospital or treatment facility will count as part of your prison sentence.<sup>19</sup> This is true no matter what you are in prison for.<sup>20</sup> For example, if your sentence is for 50 days and, after 10 days of serving your sentence, you are hospitalized for 10 days, after your hospitalization, you only have 30 days left to serve. However, after your medical condition clears up and you do not need to be hospitalized anymore, you must serve out the rest of your sentence.<sup>21</sup>

## C. STANDARD OF CARE: REASONABLENESS

If you receive medical care in prison, or if a prison transfers you to a medical facility for treatment, the care must meet a “reasonableness” standard. This means that when a court looks at whether you were given the right treatment or adequate treatment, the court will look at whether the

Chapter 16 of the main *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law.”

<sup>14</sup> *Amiss v. Dumas*, 411 So. 2d 1137, 1141 (La. App. 1 Cir. 1982) (“The general scheme which we gather from a reading of all of the statutes is that the City-Parish is responsible for the expenses of establishing, maintaining and operating the jail and for all the expenses of feeding, clothing, and *providing medical treatment* to the prisoners while the sheriff has the duty of operating the jail and seeing to it that the prisoners are properly cared for, fed and clothed.”) (emphasis added).

<sup>15</sup> Op. Atty. Gen., 1938-40, p. 393 (“The police jury of parish must pay for hospitalization of sick prisoner when it becomes absolutely necessary to remove prisoner from parish jail to hospital for treatment, particularly since allowance for sick prisoners under R.S. 15:705 is limited to 12 1/2 ¢ per day.”).

<sup>16</sup> LA. REV. STAT. § 15:831(A) (2017) (“Notwithstanding any law to the contrary, all payments to private hospitals or health care providers shall be governed by R.S. 15:824(B)(1)(c). No monies appropriated to the department from the state general fund or from dedicated funds shall be used for medical costs associated with organ transplants for prisoners or for the purposes of providing cosmetic medical treatment of prisoners, unless the condition necessitating such treatment or organ transplant arises or results from an accident or situation which was the fault of the department or resulted from an action or lack of action on the part of the department. However, nothing in this Section shall prohibit an inmate from donating his vital organs for transplant purposes.”)

<sup>17</sup> LA. REV. STAT. § 15:831(B)(2) (2017); *see also* *Wilkerson v. Champagne*, No. 03-1754, 2003 U.S. Dist. LEXIS 21645, at \*10 (E.D. La. Nov. 28, 2003) (holding that copayments required of non-indigent prisoners were not against the Constitution).

<sup>18</sup> LA. REV. STAT. § 15:831(B)(2) (2017) (“The secretary shall also establish written guidelines for collection of copayments from an inmate’s drawing account or savings account pursuant to R.S. 15:874.”).

<sup>19</sup> *State v. Brouillette*, 163 La. 46, 49, 111 So. 491, 492 (La. 1927) (holding that “a prisoner confine[d] [sic] by illness to a hospital, whether within the confines of the prison itself or elsewhere, is entitled to count the time of such confinement against his sentence”); *State ex rel. Brown v. Bailes*, 247 So. 2d 625, 627 (La. App. 2 Cir. 1971) (“We are of the opinion that under the holding in the *Brouillette* case the Sheriff had no authority to reincarcerate Wood after his release from medical treatment at the L’Herrison-Hanna Clinic as the time spent in that institution was in excess of this ten day sentence imposed by the court.”).

<sup>20</sup> *State ex rel. Brown v. Bailes*, 247 So. 2d 625, 627 (La. App. 2 Cir. 1971) (refusing to distinguish between sentence for violation of penal statute and sentence for contempt on this issue of hospitalization time counting against prison sentence).

<sup>21</sup> *State v. Brouillette*, 163 La. 46, 49–50, 111 So. 491, 492 (La. 1927) (holding that prisoner should have been returned to prison to serve the rest of his remaining sentence after hospitalization, even though his physician said that clean air and sunshine would be better for his condition).

treatment you were given was objectively reasonable.<sup>22</sup> Whether your treatment was reasonable can depend on your symptoms, whether it was an emergency situation, and what alternatives could have been given to you. This does not mean, however, that you are always owed the “ideal” or “perfect” medical care, especially if your medical condition is complicated.<sup>23</sup>

### 1. Cases Where Court Found Treatment was Reasonable

In one case, the Department of Public Safety and Corrections could not repair the inmate’s artificial leg any more, and instead gave him crutches and a wheelchair to use in wet conditions. The court found that this was a reasonable alternative, since it still allowed the patient to move around.<sup>24</sup>

In another case, the court evaluated the treatment given to a patient who had a history of severe asthma. The court found it reasonable that the patient was not treated for his asthma on a certain day, because he did not complain about having trouble breathing, and was seen walking around and talking to the other inmates.<sup>25</sup> The inmate died of a severe asthma attack. The court said that the prison officials could not have reasonably known this was going to happen, based on how the inmate acted earlier.

### 2. Cases Where Court Found Treatment was Unreasonable

Louisiana courts have ruled that prisons must have some kind of set medical health standards or procedures that they follow. Prisons have some ability to choose exactly what these standards should be.<sup>26</sup> However, if a prison does not set medical standards, and a court determines that an inmate was injured because the prison had none of these standards, the court may find that the state failed to provide reasonable medical care.<sup>27</sup>

In one case, a female inmate who was six months pregnant complained of severe pain and stomach cramps.<sup>28</sup> When she was finally taken to a hospital, she gave birth to an infant that died because it was premature.<sup>29</sup> The court said that it was unreasonable for the prison officials to only check her underwear for bleeding. They should have performed a vaginal exam or taken her to the hospital

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<sup>22</sup> *Neidlinger v. Warden*, 45-235, pp. 6–7 (La. App. 2 Cir. 5/19/10); 38 So. 3d 1171, 1173 (affirming that the standard of care for medical services is reasonableness); *Robinson v. Stalder*, 98-0558, p. 6 (La. App. 1 Cir. 1/1/99); 734 So. 2d 810, 812 (finding that “the standard of care imposed upon the Department of Public Safety and Corrections in providing for the medical needs of inmates is that those services be reasonable”); *Cole v. Acadia Parrish Sheriff’s Dep’t.*, 07-1386, p. 8 (La. App. 3 Cir. 11/5/08); 998 So. 2d 212, 216 (stating that the standard of care to provide for medical needs of inmates is reasonableness); *see also Calloway v. New Orleans*, 524 So. 2d 182, 187 (La. App. 4 Cir. 1988) (“Medical care requires some degree of professional skill. La. R.S. [§] 40:1299.39 provides that the standard of care of every health care provider shall be to exercise the same degree of skill required by others licensed in his profession in the community.”). The court in *Calloway* applied that standard to a hospital treating a transferred inmate.

<sup>23</sup> *Brown v. State*, 392 So. 2d 113, 114 (La. App. 1 Cir. 1990) (“Considering [the inmate’s] condition when he entered the penitentiary and the treatment he received while there, the Court finds that he did not receive ‘ideal’ or ‘perfect’ care, such as would have been afforded him in a private hospital. But the care he did receive was adequate and reasonable.”). The court based this partly on the fact that the inmate “was not an easy patient to treat or control. Most of plaintiff’s complaints concern his condition, which required a lot of attention. He felt that he wasn’t getting the proper amount of attention and treatment. He also complained about the doctor’s choice of medication. He was seen frequently by the doctors and given medication.” *Brown v. State*, 392 So. 2d 113, 114 (La. App. 1 Cir. 1990).

<sup>24</sup> *Robinson v. Stalder*, 98-0558, pp. 7–8 (La. App. 1 Cir. 4/1/99); 734 So. 2d 810, 813 (finding that the Department is not required to provide inmate with a new prosthesis when it provided him with these alternative means of mobility: the crutches and wheelchair).

<sup>25</sup> *Else v. Sheriff of Parrish of East Baton Rouge*, 435 So. 2d 1104, 1105–1107 (La. App. 1 Cir. 1983), *writ denied*, 440 So. 2d 762 (La. 1983).

<sup>26</sup> *Dancer v. Dep’t. of Corrs.*, 282 So. 2d 730, 733–734 (La. App. 1 Cir. 1973) (describing general standards for medical services, treatments, and qualification of medical personnel that must be set).

<sup>27</sup> *Dancer v. Dep’t. of Corrs.*, 282 So. 2d 730, 732 (La. App. 1 Cir. 1973) (“*Furthermore there were no established medical health standards or procedures in effect at Angola.* It is clear that the state breached its duty to provide reasonable medical treatment to inmates under these circumstances.”) (emphasis added).

<sup>28</sup> *Calloway v. New Orleans*, 524 So. 2d 182, 183 (La. App. 4 Cir. 1988).

<sup>29</sup> *Calloway v. New Orleans*, 524 So. 2d 182, 184 (La. App. 4 Cir. 1988).

immediately. This was required by the medical procedures and policy of the prison.<sup>30</sup>

In an extreme case, the court also held that treatment was unreasonable. A doctor locked up an inmate who could not move his lower body. He was not given help with showering or going to the bathroom.<sup>31</sup> The court did not discuss the reasons for why the doctor used this treatment but said that there was no way the treatment could be reasonable. The treatment was unreasonable because the inmate was left in very unhealthy and dirty conditions with no help.<sup>32</sup>

#### D. INFECTIOUS DISEASES (AIDS, HEPATITIS, AND TUBERCULOSIS)

##### 1. Testing Required if Person Throws Bodily Waste or Fluids on Another Inmate

Louisiana state law requires you to be tested for HIV/AIDs, hepatitis, or other infectious diseases if you are convicted of doing something that may cause another person to get an infectious disease. Things that may cause another person to get an infectious disease include spitting at them, biting them, or throwing bodily waste or fluids like feces, urine, blood, or saliva, at them.<sup>33</sup> If this is the case, you will be tested by a medically qualified person. You will be told of the results of the test.<sup>34</sup> You will have to pay for the testing.<sup>35</sup> If you test positive for an infectious disease, your results will also be told to the chief administrator of your prison.<sup>36</sup> If you test positive for an infectious disease, you will be able to get some counseling and health care services.<sup>37</sup>

##### 2. Other Circumstances in Which Testing May be Ordered

The Secretary of the Department of Public Safety and Corrections may also order you to be tested if you were in a fight or argument with someone else and there is reason to think bodily fluids were exchanged between you and the other person.<sup>38</sup>

Tuberculosis ("TB") is a disease that can spread quickly through prisons and may lead to death. Because of this, the Department of Public Safety and Corrections requires every inmate to be tested for TB.<sup>39</sup> If you test positive for TB, this does not mean you definitely have TB.<sup>40</sup> However, if you do test

<sup>30</sup> Calloway v. New Orleans, 524 So. 2d 182, 186 (La. App. 4 Cir. 1988).

<sup>31</sup> Brown v. State, 392 So. 2d 113, 114–115 (La. App. 1 Cir. 1990) ("[The inmate] could not get his wheelchair into the shower nor could he move his bowels normally. He was forced to use his hands to void his bowels and was forced to do without a bath or shower during this nine day period. For this the Department is liable to plaintiff in the sum of \$ 2,500.00.").

<sup>32</sup> Brown v. State, 392 So. 2d 113, 114–115 (La. App. 1 Cir. 1990).

<sup>33</sup> LA. REV. STAT. § 15:739(A)(1) (2017) ("Any incarcerated prisoner, whether before trial, during trial, pending appeal, or after final conviction, who is housed in any jail, prison, correctional facility, juvenile institution, temporary holding center, or detention facility within the state and who bites another person; spits or throws feces, urine, blood, saliva, or any other form of human waste or bodily fluid directly on another person; or causes, through contact, bleeding or exposure of flesh of another person in such a manner that the contact may cause the other person to contract an infectious disease, shall submit to a test designed to determine whether the incarcerated prisoner is infected with a sexually transmitted disease, or acquired immune deficiency syndrome (AIDS), the human immunodeficiency virus (HIV), HIV-1 antibodies, or any other probable causative agent of AIDS, viral hepatitis, or other infectious disease. Each incarcerated prisoner who is involved in an incident shall be deemed to be an offender and shall be subject to testing."); *see also* Seaman v. Howard, 2002-0855, p. 4 (La. App. 3 Cir. 12/30/02); 834 So. 2d 1288, 1290 (recognizing that LA. REV. STAT. § 15:739 imposes duties of testing under circumstance where blood and saliva was transferred to a law enforcement officer, but stating that the statute was not in effect at the time of the incidents in the case).

<sup>34</sup> LA. REV. STAT. § 15:739(A)(2) (2017).

<sup>35</sup> LA. REV. STAT. § 15:739(B)(3) (2017).

<sup>36</sup> LA. REV. STAT. § 15:739(A)(2) (2017).

<sup>37</sup> LA. REV. STAT. § 15:739(B) (2017).

<sup>38</sup> LA. REV. STAT. § 15:831(C) (2017).

<sup>39</sup> LA. REV. STAT. § 40:4(A)(2)(c)(iv) (2017) ("Requiring any person entering any Louisiana prison as an inmate for forty-eight hours or more to be screened for tuberculosis in a communicable state."); LA. REV. STAT. § 40:4(A)(2)(c)(v) (2017) ("Requiring any person entering any Louisiana jail as an inmate for fourteen days or more to be screened for tuberculosis in a communicable state, where funding is available."); LA. REV. STAT. § 40:4(A)(2)(c)(vi) (2017) ("Requiring all persons with acquired immunodeficiency syndrome (AIDS) or known to be infected with human

positive, you will be given medication. If you do not take this medication, you have to sign a Refusal to Accept Medical Care form. Then, you will be watched to see if you develop any more signs of TB.<sup>41</sup> During the observation, you may be placed in lockdown or medical isolation.<sup>42</sup>

For more information on infectious diseases and testing for these diseases, *see* Chapter 23 of this Supplement, “Infectious Diseases (HIV/AIDS, Tuberculosis, Hepatitis, and MRSA in Prison).”

### E. CONCLUSION

You have a right to adequate medical care while you are incarcerated. Prisons must have standards and procedures in place that ensure adequate medical care for prisoners. Furthermore, prison staff must be able to recognize medical emergencies. If you have a medical emergency or an ongoing medical condition, your prison must either treat you at your facility or transfer you to a facility where you can be treated. Finally, the medical care you receive in jail or prison must be “reasonable.” Reasonable medical care does not mean that you are entitled to the best medical care. However, if a court rules that the medical treatment you have received does not meet a standard of reasonableness, the government may be liable to you for injuries caused by inadequate medical care. You can find more information about your right to medical care while incarcerated in Chapter 23 of the main *JLM*.

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immunodeficiency virus (HIV), in the process of receiving medical treatment related to such condition, be screened for tuberculosis in a communicable state.”); *Jones v. Hearn*, 248 F. App’x. 568, 569–570 (5th Cir. 2007) (stating that the Department of Public Safety and Corrections’ health policy required TB testing and explaining the testing procedure).

<sup>40</sup> *Jones v. Hearn*, 248 F. App’x. 568, 570 (5th Cir. 2007) (stating that “a patient can have an allergic reaction to a test, resulting in a false positive”).

<sup>41</sup> *Jones v. Hearn*, 248 F. App’x. 568, 570 (5th Cir. 2007).

<sup>42</sup> *Jones v. Hearn*, 248 F. App’x. 568, 570 (5th Cir. 2007).

# CHAPTER 15: RELIGIOUS FREEDOM IN PRISON

## A. INTRODUCTION

The Louisiana Constitution protects your right of religious freedom.<sup>1</sup> The First Amendment of the U.S. Constitution as well as federal and state laws also protect this right.<sup>2</sup> The Supreme Court of Louisiana has ruled that the religious freedom protections provided by the Louisiana Constitution are similar to the religious freedom protections provided by the federal Constitution.<sup>3</sup> The Louisiana Supreme Court has also ruled that Louisiana state courts can use interpretations of the federal Constitution to help with interpreting the state constitution.<sup>4</sup> As a result, federal statutes and federal constitutional law will be important as you think about a potential claim. Chapter 27 of the main *JLM* explains federal law on religious freedom in greater detail.

Sometimes, Louisiana constitutional or statutory law provides greater protections than the federal constitution. This depends on the situation, but most of the time you can assume that the federal Constitution gives you the maximum amount of protection that you can get.

This Chapter will cover several issues regarding religious freedoms that are unique to Louisiana. These issues include your ability to change your name for religious reasons, to access prison chaplains and priests, and to access faith-based programs in prison. Read Chapter 27 of the main *JLM* to give yourself a background in the issues before you read about specific issues in Louisiana.

## B. RESTRICTIONS ON RELIGIOUS NAME CHANGES

At some point, especially if you convert to a new religion, you may want to change your name. You may feel that changing your name is important to the practice of your new religion. Prisons will often not want to let you do this and argue that changing your name will make it more difficult for them to keep track of you and more difficult for other people to identify violent offenders. Name changing, in general, is described in Chapter 27 of the main *JLM*. This section will discuss some of the relevant statutes specific to Louisiana. These restrictions have been challenged under the Free Exercise Clause of the First Amendment of the Federal Constitution and could also be challenged under the Religious Land Use and Institutionalized Persons Act (RLUIPA).<sup>5</sup>

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<sup>1</sup> LA. CONST. art. I, § 8 (“No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof.”). The wording of this section is nearly identical to the language used in the First Amendment to the U.S. Constitution.

<sup>2</sup> See Chapter 27 of the main *JLM*.

<sup>3</sup> See *Seegers v. Parker*, 256 La. 1039, 1049–1050, 241 So. 2d. 213, 216–217 (La. 1970), *cert. denied* 403 U.S. 955, 91 S. Ct. 2276, 29 L. Ed. 2d 865 (1971).

<sup>4</sup> *Seegers v. Parker*, 256 La. 1039, 1050, 241 So. 2d. 213, 217 (La. 1970) (“The great similarity of the establishment clause of our Constitution and that of the United States Constitution allows us to use the United States Supreme Court interpretations of the federal clause as an aid for interpreting our own.”). The adoption of a new Louisiana constitution in 1974 did not change this. See *State v. Forbs*, 2007-1007, p. 7 (La. App. 4 Cir. 4/23/08); 983 So. 2d 954, 958 (citing *Seegers v. Parker*, 256 La. 1039, 241 So. 2d. 213 (La. 1970)); see also *Delcarpio v. St. Tammany Parish Sch. Bd.*, 865 F. Supp. 350, 362 (E.D. La. 1994), *rev’d on other grounds*, 64 F.3d 184 (5th Cir. 1995) (“Moreover, under Louisiana jurisprudence, judicial determination of a claim brought pursuant to the parallel sections of the federal constitution is applicable to Article 1, sections 7 and 8 of the state constitution.”); La. Att’y Gen. Op. No. 75-1731 (Jan. 9, 1976), 1976 La. AG LEXIS 15, at \*2 (“Because the language of La. Const. Art. 1, § 8 is virtually identical to the parallel provision in the federal constitution, the two constitutional provisions should be interpreted in a like manner, and decisions of the United States Supreme Court construing the establishment clause of the first amendment are applicable to determining limitations imposed by legislative actions by this provision of the state constitution.”).

<sup>5</sup> You could bring a claim under the Religious Freedom Restoration Act if you were in a federal prison in Louisiana. Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb–bb-4 (2012); *City of Boerne v. Flores*, 521 U.S. 507, 534, 117 S. Ct. 2157, 2171, 138 L. Ed. 2d 624, 648 (1997). For more information on how to bring a claim under RFRA, see Chapter 27 of the main *JLM*.

## 1. Federal Rights and Protections

Under the Free Exercise Clause of the First Amendment of the Federal Constitution, a prison may refuse to recognize your choice of a religious name, if the refusal is “logically connected to a legitimate penological interest.”<sup>6</sup> This means that prison officials can prohibit you from changing your name if they can give a reason that’s related to running the prison. Prisons usually say they prohibit name changes to maintain adequate identification records.<sup>7</sup> Courts have upheld prohibitions on name changes based on this reason.<sup>8</sup> *See* Chapter 27 of the main *JLM* for more information about First Amendment challenges to restrictions on name changes.

Under RLUIPA, a prison may refuse to recognize your choice of a religious name if (1) the refusal substantially burdens your religious exercise, (2) it furthers a compelling governmental interest and (3) uses the least restrictive means.<sup>9</sup> This means that prohibiting you from changing your name would need to violate your beliefs, pressure you to change your behavior, or prevent you from engaging in religious actions that causes you more than just small trouble.<sup>10</sup> Some courts have been reluctant to find that a restriction on name changes would substantially burden your religious exercise.<sup>11</sup> *See* Chapter 27 of the main *JLM* for more information about RLUIPA challenges to restrictions on name changes.

## 2. Laws in Louisiana

According to Section 13:4751 of the Louisiana Statutes, to change your name as a prisoner, you must present a name-change petition “. . . to the district court of the parish in which [you] were *sentenced*,” describing “the reasons for the desired change.”<sup>12</sup> People who are no longer in prison can choose what parish to file in.

However, the statute also states that “[a] person who has been convicted of a felony shall not be entitled to petition for a change of name under the provisions of this Section until his sentence has been satisfied.”<sup>13</sup> This restriction on name changes for those convicted of felonies continues even if the prisoner is no longer in prison and is instead on probation or parole.<sup>14</sup> Once your sentence has been served, however, this restriction is lifted. This is the 13:4751(D)(1) restriction and is your first obstacle to changing your name in prison.

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<sup>6</sup> *See* *Matthews v. Morales*, 23 F.3d 118, 118 (5th Cir. 1994).

<sup>7</sup> *See* *Matthews v. Morales*, 23 F.3d 118, 118 (5th Cir. 1994) (holding that a state statute barring name changes by the prisoners did not violate an inmate’s free exercise of religion because it was enacted for security reasons and thus has a logical connection to legitimate governmental interests); *Barrett v. Virginia*, 689 F.2d 498, 500 (4th Cir. 1982) (“Testimony put on by the state, however, indicated that a prisoner’s records are maintained in the name of the prisoner and a number which is assigned to him at the time of incarceration, and that legal recognition of plaintiff’s adopted name would lead many other prisoners to change their names and would jeopardize the maintenance of adequate identification records.”).

<sup>8</sup> *Matthews v. Morales*, 23 F.3d 118, 118 (5th Cir. 1994)

<sup>9</sup> Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–cc-5 (2012).

<sup>10</sup> *See* *Thomas v. Review Bd.*, 450 U.S. 707, 718, 101 S. Ct. 1425, 1432, 67 L. Ed. 2d 624, 634 (1981); *see also* *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (summarizing the Supreme Court’s interpretation of “substantial burden” and noting that “a ‘substantial burden’ must place more than an inconvenience on religious exercise; a ‘substantial burden’ is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.”); *Coronel v. Paul*, 316 F. Supp. 2d 868, 880 (D. Ariz. 2004) (holding that “state action substantially burdens the exercise of religion within the meaning of the RLUIPA when it prevents a religious adherent from engaging in conduct both important to the adherent and motivated by sincere religious belief.”).

<sup>11</sup> *See* *Amun v. Culliver*, No. 04-0131-BH-M, 2006 U.S. Dist. LEXIS 75949, at \*1 (S.D. Ala. Oct. 18, 2006) (unpublished) (holding that prison’s refusal to add prisoner’s religious name to visitor list, prisoner location list, and prison correspondence was not a “substantial burden” on prisoner’s exercise of religious beliefs).

<sup>12</sup> LA. REV. STAT. ANN. § 13:4751(B) (2017).

<sup>13</sup> LA. REV. STAT. ANN. § 13:4751(D)(1) (2017).

<sup>14</sup> LA. REV. STAT. ANN. § 13:4751(D)(1) (2017).



The statute provides a second restriction, the 13:4751(D)(2) restriction, on those prisoners convicted of specific felonies. Some prisoners can never petition to change their names, even when their sentences are completed.<sup>15</sup> This lifetime restriction depends on the kind of crime you were convicted of.<sup>16</sup>

There are forty-three crimes that will automatically bar you from changing your name forever.<sup>17</sup> These crimes are listed in Section 14:2(B) of the Louisiana Revised Statutes and are labeled “crimes of violence.”<sup>18</sup>

The statute defines crimes of violence in two ways. First, it includes any crime that involves the use, threatened use, or attempted use of “physical force” against another person or his property. That crime, by its nature, must “involve a substantial risk” that physical force may be used.<sup>19</sup> Second, crimes of violence include crimes that involve a “dangerous weapon.”<sup>20</sup> The statute lists forty-three felonies that are *automatically* crimes of violence, but other felonies may also qualify if they meet the definitions mentioned above.<sup>21</sup>

The automatic crimes of violence are: Solicitation for murder; First degree murder; Second degree murder; Manslaughter; Aggravated battery; Second degree battery; Aggravated assault; Mingling harmful substances; Aggravated or first degree rape; Forcible or second degree rape; Simple or third degree rape; Sexual battery; Second degree sexual battery; Intentional exposure to AIDS virus; Aggravated kidnapping; Second degree kidnapping; Simple kidnapping; Aggravated arson; Aggravated criminal damage to property; Aggravated burglary; Armed robbery; First degree robbery; Simple robbery; Purse snatching; Extortion; Assault by drive-by shooting; Aggravated crime against nature; Carjacking; Illegal use of weapons or dangerous instrumentalities; Terrorism; Aggravated second degree battery; Aggravated assault upon a peace officer; Aggravated assault with a firearm; Armed robbery, use of firearm, additional penalty; Second degree robbery; Disarming of a peace officer; Stalking; Second degree cruelty to juveniles; Aggravated flight from an officer; Battery of a police officer; Trafficking of children for sexual purposes; Human trafficking; Home invasion; Domestic abuse aggravated assault; and Vehicular homicide, when the operator's blood alcohol concentration exceeds 0.20 percent by weight based on grams of alcohol per one hundred cubic centimeters of blood.<sup>22</sup> Other crimes may also qualify.

### 3. Cases Challenging the Louisiana Restrictions

Neither the Louisiana Supreme Court nor any federal court has addressed the issue of restricting religiously-motivated name changes under Section 13:4751.

#### a. First Amendment Challenges to 13:4751(D)(1) (Flat Ban During Sentence)

One Louisiana Court of Appeal did address Section 13:4751 name changes in *Whitmore v. State*.<sup>23</sup> This case involved a challenge to Section 13:4751 based on the Free Exercise Clause of the First Amendment of the Federal Constitution. In this case, Mr. Whitmore, a prisoner, converted to Islam and wished to change his name. He was prevented from doing so by § 13:4751(D).<sup>24</sup> The court found § 13:4751(D) to be

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<sup>15</sup> LA. REV. STAT. ANN. § 13:4751(D)(2) (2017) (“Notwithstanding the provisions of Paragraph (1) of this Subsection or any other provision of law to the contrary, a person convicted of any felony enumerated in R.S. 14:2(B) shall not be entitled to petition for a change of name.”).

<sup>16</sup> LA. REV. STAT. ANN. § 13:4751(D)(2) (2017).

<sup>17</sup> LA. REV. STAT. ANN. § 14:2(B) (2017).

<sup>18</sup> LA. REV. STAT. ANN. § 14:2(B) (2017).

<sup>19</sup> LA. REV. STAT. ANN. § 14:2(B) (2017) (“In this Code, ‘crime of violence’ means an offense that has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, and that, by its very nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense or an offense that involves the possession or use of a dangerous weapon.”).

<sup>20</sup> LA. REV. STAT. ANN. § 14:2(B) (2017).

<sup>21</sup> LA. STAT. ANN. § 14:2(B) (2017) (listing crimes defined as a “crime of violence.”).

<sup>22</sup> LA. STAT. ANN. §§ 14:2(B)(1)–(47) (2017).

<sup>23</sup> *Whitmore v. State*, 99-1988 (La. App. 1 Cir. 02/18/00); 752 So. 2d 365.

<sup>24</sup> *Whitmore v. State*, 99-1988, p. 2 (La. App. 1 Cir. 02/18/00); 752 So. 2d 365, 366.

constitutional because the statute is logically connected with a “legitimate government interest.”<sup>25</sup> The “legitimate government interest” was the state’s desire “to maintain adequate identification records and to preserve the criminal history of convicted felons.”<sup>26</sup> Other courts have also employed the “logical connection to a legitimate government interest” test for similar name-changing restrictions, and it appears to be the standard.<sup>27</sup>

*Bartley*, another case involving a convert to Islam attempting to change his name, was decided similarly to *Whitmore*.<sup>28</sup> In *Bartley*, the court found that § 13:4751(D) did not sufficiently restrict the free exercise of religion to be invalidated under the First Amendment of the Federal Constitution.<sup>29</sup>

It is likely that Louisiana courts will find that the First Amendment doesn’t prohibit prisons from restricting name changes while a prisoner serves his sentence.

#### b. First Amendment Challenges to 13:4751(D)(2) (Lifetime Ban)

*Whitmore* and *Bartley* did not involve a prisoner restricted by the lifetime restriction (§ 13:4751(D)(2)).<sup>30</sup> Additionally, even the *Whitmore* case noted that the restriction in § 13:4751(D)(1) is constitutional as it is not a *complete* ban on name changes. It only runs for the length of the sentence.<sup>31</sup> The separate § 13:4751(D)(2) ban for prisoners convicted of certain felonies, however, is much more complete and continues for the life of the prisoner, even after he has served his sentence.<sup>32</sup> It is a different kind of ban. Even other courts that used the “logical connection to legitimate government interests” test—the same test used in *Whitmore*—to uphold flat bans on name changes for current prisoners did not address *life-time* bans. Life-time bans are even more restrictive.<sup>33</sup> Whether it is constitutional is unclear—no case has

<sup>25</sup> *Whitmore v. State*, 99-1988, p. 3 (La. App. 1 Cir. 02/18/00); 752 So. 2d 365, 366. In an earlier case, a Louisiana court came to the opposite conclusion. In *Sparks*, denying a name change to a prisoner—also a convert to Islam—was found to violate the prisoner’s First Amendment rights. But *Sparks* was decided before the restriction in § 13:4751(D) was enacted and was centered on a district attorney’s denial to recognize the new name because of record-keeping convenience. In addition, even the *Sparks* case admitted that there might be times when it would be reasonable to restrict name changes for “legitimate . . . interests.” *Sparks v. Ware*, 509 So. 2d 811, 812–813 (La. App. 1 Cir. 1987) (“The district attorney did not file a brief in this court, but we assume from his answer to the petition that his objection to petitioner’s name change is based on the idea that it would disrupt prison records, prison operations, the detainer system, and efforts to recapture escaped prisoners. Although we realize that there is some risk of confusion in prison record keeping when a prisoner takes a new name, prison authorities must routinely deal with inmates who have several names at the time they enter prison. Such a prisoner’s record reflects both his legal name and all known aliases. When a prisoner takes his religious name as his legal name, the prison record system could simply add the new name to the existing records reflecting his previous legal name.”). Thus, *Whitmore* and the new § 13:4751(D) provision at least partly overruled *Sparks*.

<sup>26</sup> *Whitmore v. State*, 99-1988, p. 3 (La. App. 1 Cir. 02/18/00); 752 So. 2d 365, 366 (“LSA-R.S. 13:4751 D is logically connected to legitimate governmental interests. It was enacted for security reasons and is intended to maintain adequate identification records and to preserve the criminal history of convicted felons. The provision is necessary to maintain security, order, and administrative efficiency in penal institutions. Because the statute’s limitation on prisoners’ name changes is reasonably related to legitimate penological interests, it is not unconstitutional.”).

<sup>27</sup> See, e.g., *Matthews v. Morales*, 23 F.3d 118, 119–120 (5th Cir. 1994).

<sup>28</sup> *Bartley v. Mamoulides*, 97-42 (La. App. 5 Cir. 4/29/97); 694 So. 2d 1050.

<sup>29</sup> *Bartley v. Mamoulides*, 97-42, p. 4 (La. App. 5 Cir. 4/29/97); 694 So. 2d 1050, 1052 (1997) (“ . . . we believe the requirements of prison record-keeping and identification of convicted felons can take precedence over religious practices unless those practices are shown to be compelling requirements of the religion. The petition here sets forth no compelling reason for the name change. . . . We do not find the statutory limitations place substantial burdens on his religious liberty.”).

<sup>30</sup> *Bartley v. Mamoulides*, 97-42, p. 4 (La. App. 5 Cir. 4/29/97); 694 So. 2d 1050, 1052 (1997).

<sup>31</sup> *Whitmore v. State*, 99-1988, p. 3 (La. App. 1 Cir. 02/18/00); 752 So. 2d 365, 367 (“LSA-R.S. 13:4751 D provides a legitimate limitation, as opposed to a complete ban on name changes. Only those convicted of a felony are impacted and the time frame is limited to satisfaction of sentence.”).

<sup>32</sup> See LA. REV. STAT. ANN. § 13:4751(D)(2) (2017).

<sup>33</sup> *Matthews v. Morales*, 23 F.3d 118, 119–120 (5th Cir. 1994) (“Under the standard announced in *O’Lone*, we must determine whether a statute barring name changes by prisoners and probationers, like the regulation barring prisoners from returning to the main building, has ‘a logical connection to legitimate governmental interests.’ [Section] 32.22 was enacted for security reasons. It is intended to protect the ability to identify persons sought on warrant and

addressed this issue directly. *See* Chapter 27 of the main *JLM* for more information on name change restrictions.

c. RLUIPA Challenges to Flat Bans During Sentence and Lifetime Bans

*Whitmore* and *Bartley* were also decided before RLUIPA was enacted and there are no cases that have challenged Section 13:4751(D) under RLUIPA. Therefore, it might be possible to challenge both types of name restrictions under RLUIPA. *See* Chapter 27 of the main *JLM* for more information on name change restrictions and how to challenge restrictions on your religious freedom.

In conclusion, your ability to change your name for religious reasons in prison is heavily restricted. The restriction that lasts for the whole length of a sentence has been upheld twice in state courts. If you are trying to change your name for religious reasons and your sentence is still running, you may not be able to do it. You can attempt to show the court that changing your name immediately is a requirement of your religion, but this will be difficult to do. Recently, courts have denied such cases.

On the other hand, if your sentence has run but you have committed one of the felonies that will trigger § 13:4751(D)(2), you may *never* be allowed to change your name. Whether this is constitutional or valid under RLUIPA or other legislation is currently unclear. No cases have discussed this specific provision, but courts *might* be against flat, life-time bans.

### C. ACCESS OF CHAPLAINS/PRIESTS TO INMATES

Your religion might require you to hold group or community meetings that possibly are led by a religious leader, also known as a chaplain. Or you may feel that you need more instruction in the ways of your religion and want a chaplain to guide you through religious teachings. Sometimes this may involve bringing in “outside volunteers” to lead religious meetings or teach new converts.

Prisons often object to bringing in new chaplains for a variety of reasons. They might say that security is an issue. They might argue that they have too little space. They might tell you that there are too few participants in your religion to merit getting its own chaplain. Most of the time, courts will agree that prisons do not have to let you practice your religion how you see fit and will not force prisons to hire new chaplains for your religion. On the other hand, if other religious groups have access to chaplains and there are volunteers willing to serve your religious group, prisons will have a harder time convincing courts that you should not be allowed access to a chaplain. These issues are all discussed in Chapter 27 of the main *JLM*.

These cases will be very fact specific, but you should focus on any discriminatory practices that the prison engages in if you decide to file suit.

#### 1. Statutory Access to Chaplains and Priests

Louisiana provides two statutory protections that guarantee prisoners the ability to access priests and chaplains of other religious denominations.

The first is Section 15:858, which states that the warden must provide to prisoners the services of a full-time Catholic priest.<sup>34</sup> The section also provides that you must have access to this priest at all times.<sup>35</sup>

In addition to a full-time Catholic priest, Section 15:857 requires the warden to provide all prisoners with a full-time Protestant chaplain who is to represent the “predominant non-Catholic denomination” of

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detainer, and to preserve the criminal history of felons. Matthews himself concedes in his brief that these are ‘legitimate state penological concerns.’”) (citing *O’Lone v. Estate of Shabazz*, 428 U.S. 342, 349 (1987)).

<sup>34</sup> LA. REV. STAT. ANN. § 15:828 (2017).

<sup>35</sup> LA. REV. STAT. ANN. § 15:828 (2017).

the prison.<sup>36</sup> Section 15:857 also *allows* the warden to hire additional *part-time* chaplains of *any* religious denomination, but the section *does not require* the appointment of any additional chaplains.<sup>37</sup>

There are not currently any state or federal cases interpreting these two sections.

## 2. Challenging Access to Chaplains and Priests

Generally, there is no First Amendment or other Federal Constitutional claim that guarantees you access to a chaplain of your choice. In other words, you are not guaranteed a religious leader to lead your religious denomination. This is discussed in Chapter 27 of the main *JLM*.

But prisons cannot unreasonably limit your access to chaplains and other religious leaders who are available and who volunteer to lead congregations in your prison. You can challenge these restrictions in the same way you can challenge the restriction on name changes discussed in Part B. You can challenge these restrictions under the Free Exercise Clause of the First Amendment of the Federal Constitution or the Religious Land Use and Institutionalized Persons Act.

### a. First Amendment Challenges to Chaplain Access

The test that courts use to determine if a restriction is constitutional under the First Amendment is the same one discussed in Part B: whether the regulation restricting access is “reasonably related to legitimate penological interests.”<sup>38</sup>

Usually, restrictions that are based on security, space, or staff limitations are upheld.<sup>39</sup> For example, there are restrictions that forbid religious groups to gather without an outside-volunteer-religious leader present.<sup>40</sup> These restrictions are upheld as long as alternative means of worship—such as worshipping alone in your cell—are available.<sup>41</sup> Prisons do not have to let you worship in the exact way you want. For more detailed information on what prisons must provide and what they may allow about the practice of religion, please read Chapter 27 of the main *JLM*.

Under the First Amendment analysis, courts have found it important that prison policies regarding the practice of religion are neutral.<sup>42</sup> This does not mean that the prison must accommodate every religious

<sup>36</sup> LA. REV. STAT. ANN. § 15:857 (2017) (“The warden shall provide for the services on a contractual basis of a full-time minister of the predominant non-Catholic denomination who shall serve as the Protestant chaplain. The inmates shall at all times have access to the Protestant chaplain.”).

<sup>37</sup> LA. REV. STAT. ANN. § 15:857 (2017) (“The warden may provide for the employment of additional part-time chaplains of any religious denomination on a contractual basis and shall have authority to fix their fees.”).

<sup>38</sup> *Mayfield v. Texas Dep’t. of Criminal Justice*, 529 F.3d 599, 607 (5th Cir. 2008).

<sup>39</sup> *Mayfield v. Texas Dep’t. of Criminal Justice*, 529 F.3d 599, 608 (5th Cir. 2008) (“The TDCJ’s asserted justifications for the volunteer requirement involve prison security concerns, as well as staff and space limitations. These are valid penological interests. We have recognized in previous cases that the TDCJ’s volunteer requirement is rationally related to these legitimate concerns.”); *Baranowski v. Hart*, 486 F.3d 112, 121 (5th Cir. 2007) (“The record demonstrates that the prison policies at issue here are logically connected to legitimate penological concerns of security, staff and space limitations.”).

<sup>40</sup> *Baranowski v. Hart*, 486 F.3d 112, 121 (5th Cir. 2007) (“Baranowski’s main complaint is that the prison could accommodate the need for weekly Jewish services if inmates were permitted to lead the services without the assistance of a rabbi or approved outside volunteer. However, *Adkins* rejected this argument, and we do so again here.”); *Adkins v. Kaspar*, 393 F.3d 559, 571 (5th Cir. 2004) (“The requirement of an outside volunteer . . . does not place a substantial burden on Adkins’s religious exercise.”).

<sup>41</sup> *Baranowski v. Hart*, 486 F.3d 112, 121 (5th Cir. 2007) (“The summary judgment evidence shows that despite being denied weekly Sabbath services and other holy day services when a rabbi or approved volunteer is not present, Baranowski retains the ability to participate in alternative means of exercising his religious beliefs, including the ability to worship in his cell using religious materials and the ability to access the chapel and lockers containing religious materials on certain days and times.”).

<sup>42</sup> *Mayfield v. Texas Dep’t. of Criminal Justice*, 529 F.3d 599, 607 (5th Cir. 2008) (“[The] standard also includes a neutrality requirement—‘the government objective must be a legitimate and neutral one . . . [and] [w]e have found it important to inquire whether prison regulations restricting inmates’ First Amendment rights operated in a neutral fashion.’”) (quoting *Turner v. Safely*, 482 U.S. 78, 90 (1987)).

group equally; prisons can consider the overall size of the group and the demand for that specific religious practice.<sup>43</sup> But the prison cannot intentionally discriminate against your religious group unless it has good reason for doing so.<sup>44</sup>

The current Louisiana statute seems to give better treatment to practicing Catholics and Protestants, as those are the only groups that are *required* to have full-time chaplains appointed by the warden. This statute is facially discriminatory which means that at first glance, the language of the statute (the way it's written) outwardly discriminates against certain people. The statute may even be invalid, especially if your prison uses this to discriminate against your religious group. For more information about how to challenge statutes that might discriminate based on your religion, *see* Chapter 27 of the main *JLM*.

#### b. RLUIPA

If you feel that your religious group is being discriminated against because the prison refuses to provide you with access to a chaplain or another religious leader of your choice, you may be able to make a claim under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).<sup>45</sup> *See* Chapter 27 of the main *JLM* for more information on how to make claims under those provisions.

Generally, courts will analyze claims for violations of RLUIPA by evaluating two factors. First, courts will look to see if the practice of religion has been substantially burdened.<sup>46</sup> If it has, courts then look to see if the prison is using the least restrictive means possible.<sup>47</sup>

*Substantial Burden:* For a court to find a substantial burden on the practice of religion, you will have to allege that it is nearly impossible for you to practice your religion under the circumstances. Substantial burdens may include situations where practitioners are completely unable to meet together and practice their religion, or where there are no outside volunteers available to lead meetings.<sup>48</sup> If you absolutely need an outside chaplain to practice your religion, your prison is not providing you with one, and you have no other options, you may have a claim.

*Least Restrictive Means:* If you can prove that there is a substantial burden on your practice of religion, you will also need to show that it would be possible for the prison to use less restrictive methods in furthering its interest in regulating prisoners. Prisons will argue that they need outside volunteers to run meetings for security reasons and to make sure prisoners don't exert influence on one another.<sup>49</sup> Courts may not be persuaded by arguments that these restrictions make it totally impossible for you to worship

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<sup>43</sup> *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972) ("We do not suggest, of course, that every religious sect or group within a prison—however few in number—must have identical facilities or personnel. A special chapel or place of worship need not be provided for every faith regardless of size; nor must a chaplain, priest, or minister be provided without regard to the extent of the demand.").

<sup>44</sup> *Mauro v. Arpaio*, 188 F.3d 1054, 1068 (9th Cir.1999) (en banc) (Kleinfeld, J., dissenting) (The term penological relates to "the 'theory and practice of prison management and criminal rehabilitation.'")

<sup>45</sup> You could bring a claim under the Religious Freedom Restoration Act if you were in a federal prison in Louisiana. Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb–bb-4 (2012); *City of Boerne v. Flores*, 521 U.S. 507, 534, 117 S. Ct. 2157, 2171, 138 L. Ed. 2d 624, 648 (1997). For more information on how to bring a claim under RFRA, *see* Chapter 27 of the main *JLM*.

<sup>46</sup> *Newby v. Quarterman*, 325 Fed. App'x. 345, 350 (5th Cir. 2009).

<sup>47</sup> *Newby v. Quarterman*, 325 Fed. App'x. 345, 351 (5th Cir. 2009) ("Having determined that there is a reasonable basis for a factfinder to conclude that the outside-volunteer policy substantially burdens [a prisoner's] free exercise, we must still evaluate whether that policy is the least restrictive means of furthering a compelling governmental interest.").

<sup>48</sup> *Newby v. Quarterman*, 325 Fed. App'x. 345, 350 (5th Cir. 2009). ("In making this determination [in *Mayfield v. Texas Dep't of Criminal Justice*, 529 F.3d 599, 614–615 (5th Cir. 2008)], we noted the lack of evidence that a volunteer would become available in the future to reduce the burden on Mayfield's ability to worship. Newby has alleged that the TDCJ-ID's outside-volunteer policy has precluded members of the Buddhist faith on the Roach Unit from meeting, and the *Martinez* report corroborates that there is a total lack of approved Buddhist volunteers to conduct meetings. These facts suggest that the burden on Newby is greater than that of the inmate in *Mayfield*").

<sup>49</sup> *Newby v. Quarterman*, 325 Fed. App'x. 345, 351 (5th Cir. 2009).

communally (in a group),<sup>50</sup> especially if it can be shown that there are other ways for you to hold communal meetings without an outside volunteer or that other groups have found ways to hold communal meetings while facing similar security concerns.<sup>51</sup> In addition, you may allege disparate application of prison policy (that your religious group is being treated differently than other groups) regarding communal meetings to show that least restrictive means are not being used.<sup>52</sup> If you can show that you are being treated differently than other religious groups, you may be able to state a claim. For more information on RLUIPA, please read chapter 27 of the main *JLM*.

If you feel that the practice of your religion is restricted because the prison will not provide you with a chaplain and will not allow you alternative means by which to practice, make sure to make claims under both the First Amendment and RLUIPA, as discussed in Chapter 27 of the main *JLM*. Courts will generally be sensitive to situations in which your religious group is being treated differently from others. If you can show that other similar groups are getting better treatment, you may be able to state a claim for relief.

#### D. FAITH-BASED PROGRAMS (R.S. § 15:828.2)

Chapter 27 of the main *JLM* discusses the recent increase in faith-based rehabilitation programs. Your prison may have some of these programs, and Louisiana has enacted a statute that specifically addresses them.

There is very little case law, either at the state or federal level, discussing faith-based programs. However, it is unlikely that prisons will be able to discriminate against your religious groups using these programs.

##### 1. Current Louisiana Laws

Louisiana has passed a unique statute regarding faith-based rehabilitation programs. The statute states that “faith-based programs offered in state and private correctional institutions and facilities have the potential to facilitate prisoner institutional adjustment, to help prisoners assume personal

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<sup>50</sup> *Newby v. Quarterman*, 325 Fed. App’x. 345, 352 (5th Cir. 2009) (“[W]e cannot see ‘why many of the security concerns voiced by Texas cannot be met by using less restrictive means, even taking into account cost.’ For instance, Chaplain Nino or other prison staff could supervise, rather than conduct, Buddhist ceremonies, thus ensuring that no inmate exerts undue influence over his peers. Newby alleges that ‘numerous Buddhist clergy [have] offered remote supervision, audio/video tapes, and consultation for Chaplain Nino,’ who through exercise of his supervisory authority could ensure that any communal worship is consistent with the tenets of the Buddhist faith.”).

<sup>51</sup> *Newby v. Quarterman*, 325 Fed. App’x. 345, 352 (5th Cir. 2009) (“Newby alleges that ‘numerous Buddhist clergy [have] offered remote supervision, audio/video tapes, and consultation for Chaplain Nino,’ who through exercise of his supervisory authority could ensure that any communal worship is consistent with the tenets of the Buddhist faith. While Buddhists might not be entitled to the benefits of the consent decree in *Brown v. Beto*, the fact that Muslims regularly engage in communal worship without an approved religious volunteer is some evidence that the security and safety concerns identified by Texas can be addressed through less restrictive alternatives. The feasibility of these alternatives and others can be explored on remand.”).

<sup>52</sup> *See Newby v. Quarterman*, 325 Fed. App’x. 345, 352 (5th Cir. 2009) (“Newby also alleges that Chaplain Nino is targeting Buddhists through the disparate application of TDCJ-ID’s outside-volunteer policy. According to Newby, (1) Muslims may hold services without an approved religious volunteer, but Buddhists may not; and (2) Chaplain Nino conducts or supervises a variety of Christian activities, but not Buddhist activities. Newby alleges that TDCJ-ID does not allow him to meet with other Buddhists under the same conditions as these “god-based groups.” These allegations of disparate application might provide a reasonable basis for a factfinder to conclude that the outside-volunteer policy is not the least restrictive means of furthering a compelling governmental interest.”); *see also Cruz v. Beto*, 405 U.S. 319, 322 (1972) (“If Cruz was a Buddhist and if he was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts, then there was palpable discrimination by the State against the Buddhist religion, established 600 B.C., long before the Christian era.”).

responsibility, and to reduce recidivism.”<sup>53</sup> The statute also states that the legislature intends for faith-based programs to be made more available to prisoners.<sup>54</sup>

The statute then says that prisons *shall* do three things: (1) “[m]easure recidivism rates for all prisoners participating in faith-based or religious programs,”<sup>55</sup> (2) try to increase the number of “volunteers ministering to prisoners from various faith-based institutions in the state,”<sup>56</sup> and (3) “[d]evelop community linkages with churches, synagogues, mosques, and other faith-based institutions to assist in the release of participants back into the community.”<sup>57</sup>

Currently, only one federal case (and no state case) has mentioned this provision, and that case mentioned it only in passing.<sup>58</sup> While cases haven’t discussed what this statute requires prisons to do, it may be useful to mention when advocating for faith-based programs or brining a claim based on your religious freedoms.

## E. CONCLUSION

Your First Amendment protections are not erased once you go to prison. However, since prisons have an interest in orderly administration, courts have found that prisons can limit your ability to practice your religion as long as those limitations are reasonable, non-discriminatory, and serve some sort of prison-related interest. Prisons cannot single out your religious group for punishment, however. They have to listen to your requests and try to provide you with the ability to practice your religion when possible. You might not always be able to practice your religion how you want but prisons generally cannot discriminate against you, or keep you from practicing your religious beliefs without reasons that are supported by law. This chapter covers the law relating to religious freedom in prisons, and the ways in which Louisiana law has developed in these areas. If you feel that you may have a case based on reading this chapter, it is important that you try to first exhaust your resources in the prison before seeking litigation. Read Chapter 27 of the main *JLM* for more information about your religious freedom in prison.

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<sup>53</sup> LA. REV. STAT. ANN. § 15:828.2 (2017).

<sup>54</sup> LA. REV. STAT. ANN. § 15:828.2 (2017) (“It is the intent of the legislature that the Department of Public Safety and Corrections and private vendors operating private correctional facilities work toward ensuring the availability and development of such programs at the correctional institutions and facilities of this state . . .”).

<sup>55</sup> LA. REV. STAT. ANN. § 15:828.2(1) (2017).

<sup>56</sup> LA. REV. STAT. ANN. § 15:828.2(2) (2017).

<sup>57</sup> LA. REV. STAT. ANN. § 15:828.2(3) (2017).

<sup>58</sup> Orso v. Shumate, No. 3:10-CV-1069, 2010 U.S. Dist. Lexis 140978, at \*11 (W.D. La. Oct. 13, 2010).

# CHAPTER 16: SPECIAL ISSUES FOR PRISONERS WITH MENTAL ILLNESS

## A. INTRODUCTION

This Chapter is written for prisoners who have psychological illnesses and who have symptoms that can be diagnosed. It is meant for prisoners who suffer from mental illness while in prison. This Chapter does not address the separate issue of people who have been found not guilty by reason of insanity (“NGIs”). Rather, it explains your rights as a prisoner with a mental illness in Louisiana. This Chapter should be read together with Chapter 29 of the main *Jailhouse Lawyer’s Manual* (“JLM”), “Special Issues for Prisoners with Mental Illness.” Keep in mind that as a prisoner in Louisiana, you should rely on the state law discussed in this chapter.

This Chapter covers several topics that are important for prisoners who may have a mental illness. Part B provides some basic information you will need to understand how the law applies to prisoners with mental illnesses, including definitions of important terms such as “mental illness” and “treatment.” Part C explains your right to receive treatment for a mental illness. Part D details the process for commitment and treatment of prisoners with mental illnesses. Part E talks about your right to refuse unwanted treatment and the limits on that right.

## B. DEFINING “MENTAL ILLNESS” AND “TREATMENT”

You may have heard the terms mental illness, mental disorder, mental sickness, mental abnormality, or mentally retarded. Sometimes people use these terms to mean the same thing. They are not the same. If you are a state prisoner in Louisiana, it is important for you to know what the term “mental illness” means under Louisiana law. This section will provide you with that definition and help you understand if the issues discussed in this chapter apply to you.

### 1. What is “Mental Illness”?

Louisiana law defines a “person who has a mental illness” as someone “with a psychiatric disorder which has substantial adverse effects on his ability to function and who requires care and treatment.”<sup>1</sup> This means that a mentally ill person must have a mental disorder that makes it very hard for him to function. The mental disorder must also require treatment and care. Intellectual disability, epilepsy, or a drug problem are not by themselves mental illnesses.<sup>2</sup>

For more information about your right to medical treatment for issues that do not come within the definition of mental illness, you should read Chapter 14 of the *Louisiana State Supplement*, “Your Right to Adequate Medical Care,” and Chapter 23 of the main *JLM*, also called “Your Right to Adequate Medical Care.”

### 2. What is “Treatment”?

Louisiana law defines “treatment” as “an active effort to accomplish an improvement in the mental condition or behavior of a patient or to prevent deterioration in his condition or behavior.”<sup>3</sup> Treatment might be “hospitalization, partial hospitalization, outpatient services, examination, diagnosis, training, [and] the use of pharmaceuticals . . . .”<sup>4</sup> Treatment might be something else too. Part C discusses your right to treatment for mental illness and what treatment the state must provide for you.

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<sup>1</sup> LA. REV. STAT. ANN. § 28:2(20) (2017).

<sup>2</sup> LA. REV. STAT. ANN. § 28:2(20) (2017).

<sup>3</sup> LA. REV. STAT. ANN. § 28:2(31) (2017).

<sup>4</sup> LA. REV. STAT. ANN. § 28:2(31) (2017).



## C. YOUR RIGHT TO TREATMENT

This Part explains two rules regarding your right to psychiatric medical care. Section 1 of this Part discusses your right to reasonable medical care. Section 2 talks about your rights if psychiatric care is delayed or denied. These sections both discuss standards as they have been specifically applied in Louisiana, but you should also read Part D(1) and Part D(2) of Chapter 29 of the main *JLM*, “Special Issues for Prisoners with Mental Illness” for more information on the constitutional standards that may apply.

### 1. Your Right to Reasonable Psychiatric Medical Care

You have a right to adequate medical care and treatment. The Eighth Amendment of the Constitution<sup>5</sup> requires the government to provide medical care to prisoners.<sup>6</sup> This right covers the regular medical care necessary for your health and safety. For more information about this general right, you should read Chapter 23 of the main *JLM*, “Your Right to Adequate Medical Care.”

In Louisiana, the state must provide reasonable medical care to prisoners.<sup>7</sup> Courts have decided that this includes treatment for mental illness. The Fifth Circuit said that mental health needs are as important as physical health needs.<sup>8</sup> You have a right to reasonable treatment, but this does not have to be the same as the treatment you want.<sup>9</sup> Reasonable care also does not mean the best possible treatment.<sup>10</sup>

### 2. Denied or Delayed Treatment

Courts do not like to doubt doctors' decisions,<sup>11</sup> but a prison official who denies or delays treatment might be violating your constitutional rights if he knows you need that treatment. You have a right to be free of “cruel and unusual treatment” under the Eighth Amendment.<sup>12</sup> This section discusses your rights when treatment you need has been *deliberately* or purposely denied or delayed.

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<sup>5</sup> U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*.”) (emphasis added).

<sup>6</sup> *Estelle v. Gamble*, 429 U.S. 97, 103–104, 97 S. Ct. 285, 290–291, 50 L. Ed. 2d 251, 259–260 (1976) (holding that the 8th Amendment prohibits denying needed medical care); *Woodall v. Foti*, 648 F.2d 268, 272 (5th Cir. 1981) (“It is now firmly established that the Eighth Amendment imposes an obligation on prison and jail administrators to provide reasonable medical care for those who are incarcerated.”).

<sup>7</sup> *Brown v. State*, 392 So. 2d 113, 115 (La. App. 1 Cir. 1980); *see also*, *Harper v. Goodwin*, 41-053, p. 6 (La. App. 2 Cir. 5/17/06), 930 So. 2d 1160, 1163 (prison authorities owe a duty to provide prisoners with reasonable medical care); *Moreau v. State* through Dept. of Corr., 333 So. 2d 281, 284 (La. App. 1 Cir. 1976) (the duty to provide reasonable medical care for prisoners “does not require the defendant to maintain a full hospital at the site of each of its prisons in order to protect the inmates against every known medical risk,” but “does encompass the risk . . . that an inmate would be injured and require life-saving medical attention”).

<sup>8</sup> *Gates v. Cook*, 376 F.3d 323, 343 (5th Cir. 2004); *see also*, *Wilkerson v. Stalder*, 639 F. Supp. 2d 654, 677 (M.D. La. 2007) (“The Eighth Amendment protects not only inmates’ physical health, but their mental health as well.”); *Adams v. Mathis*, 458 F. Supp. 302, 308 (M.D. Ala. 1978), *aff’d*, 614 F.2d 42 (5th Cir. 1980) (“When a state or county takes a citizen into custody the state assumes the responsibility for the individual’s physical and mental health.”).

<sup>9</sup> *See, e.g.*, *Mayweather v. Foti*, 958 F.2d 91, 91 (5th Cir. 1992) (where prisoner received continuous treatment for his back injury, the fact that treatment was not “the best that money could buy” and that medication may have been forgotten occasionally did not amount to an unreasonable standard of care).

<sup>10</sup> *See, e.g.*, *Robinson v. Stalder*, 98-0558, p. 6 (La. App. 1 Cir. 4/1/99), 734 So. 2d 810, 813 (finding obligation to provide reasonable medical care met where prisoner was provided with crutches and wheelchair when artificial leg could no longer be repaired); *Cole v. Acadia Parish Sheriff’s Dep’t.*, 2007-1386 pp. 8–14 (La. App. 3 Cir. 11/5/08); 998 So. 2d 212, 217–221 (delay in antibiotic treatment was reasonable where there was a lack of symptoms indicating infection and seventeen day delay in dental appointment following prisoner’s complaint of toothache was reasonable where there was no sign of infection and no dental emergency).

<sup>11</sup> *See, e.g.*, *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991) (finding prisoner’s disagreement with medical treatment did not rise to the level of violating his rights).

<sup>12</sup> *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976) (citing *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925, 49 L. Ed. 2d 859, 875 (1976)) (“We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain . . . proscribed by the

### a. The “Deliberate Indifference” Standard

To make a successful claim for denial or delay of treatment, you must show that prison officials acted with “deliberate indifference” to your serious medical or mental health needs.<sup>13</sup> The deliberate indifference standard was first used in cases about serious medical care. Now it applies to treatment that is needed for mental illness as well.<sup>14</sup> However, this is a hard standard for you to meet.<sup>15</sup> The facts set out in your claim of deliberate indifference must first make clear to the court what your medical need is. Then you must show how prison officials have failed to attend to that need.<sup>16</sup>

The deliberate indifference standard is a *subjective* standard. This means you must show that prison officials *actually* knew about a risk to your health and still ignored it.<sup>17</sup> It is not enough to show that prison officials *should have known* about a risk to your health.

To meet this standard, a prisoner might submit evidence that officials “refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a *wanton* disregard for any serious medical needs.”<sup>18</sup> It is important to show that the prison official’s conduct was “wanton.” The Supreme Court laid out the following test to determine when an action is “wanton”:

- 1) A health specialist or prison official had a **duty to prevent harm** to you or others;
- 2) A health specialist **knowingly failed** to prevent injury after discovering the danger to you or others, **or** a mental health specialist **should have known** of such danger; and
- 3) In either case, the health specialist or prison official must also have **known of the unavoidable or probable results** of his failure.<sup>19</sup>

If the risk is obvious, the court will probably say that the prison official had knowledge of that risk.<sup>20</sup> An example of an obvious risk is when prison officials fail to provide immediate medical assistance to a prisoner who is unconscious.<sup>21</sup> Prison officials also cannot ignore obvious risks to mental health.<sup>22</sup> For

Eighth Amendment.”). *But see* Billings v. Gates, 133 Or. App. 236, 242, 890 P.2d 995, 998 (Or. Ct. App. 1995), *aff’d*, 323 Or. 167, 916 P.2d 291 (state court declining to follow the “deliberate indifference” test, instead opting to follow state precedent regarding cruel and unusual punishment).

<sup>13</sup> Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251, 261 (1976) (“[A] prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.”).

<sup>14</sup> See Gates v. Cook, 376 F.3d 323, 343, 28 NDLR P 190 (5th Cir. 2004) (where deliberate indifference is alleged, “mental health needs are no less serious than physical needs.”); Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1187 (5th Cir. 1986) (“A serious medical need may exist for psychological or psychiatric treatment, just as it may exist for physical illness.”).

<sup>15</sup> Domino v. Texas Dep’t. of Crim. Justice, 239 F.3d 752, 756 (5th Cir. 2001) (“Deliberate indifference is an extremely high standard to meet,” as a prisoner must show that the official had a “wanton disregard for any serious medical needs.”).

<sup>16</sup> Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985) (holding that a complaining prisoner “must *clearly evince* the medical need in question and the alleged official dereliction.”) (emphasis in original).

<sup>17</sup> See Lawson v. Dallas County, 286 F.3d, 257, 262 (5th Cir. 2002) (“The deliberate indifference standard is a subjective inquiry; the plaintiff must establish that the prison officials were actually aware of the risk, yet consciously disregarded it.”).

<sup>18</sup> Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985) (refusing to hold for plaintiff where he did not present this evidence) (emphasis added).

<sup>19</sup> Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985) (quoting Smith v. Wade, 461 U.S. 30, 39 n.8, 103 S. Ct. 1625, 1632 n.8, 75 L. Ed. 2d 632 (1983) (defining wanton as “the conscious failure by one charged with a duty to exercise due care and diligence to prevent an injury after the discovery of the peril, or under circumstances where he is charged with a knowledge of such peril, and being conscious of the inevitable or probable results of such failure”).

<sup>20</sup> Bias v. Woods, 288 Fed. App’x. 158, 162 (5th Cir. 2008) (“Under exceptional circumstances, a prison official’s knowledge of a substantial risk of harm may be inferred by the obviousness of a substantial risk.”).

<sup>21</sup> See, e.g., Bias v. Woods, 288 Fed. App’x. 158, 159–161, 164 (5th Cir. 2008) (finding deliberate indifference to a serious medical need where doctor ordered transport of unconscious prisoner to a separate prison unit 150 miles away instead of providing immediate medical assistance); Austin v. Johnson, 328 F.3d 204, 210 (5th Cir. 2003) (“[F]ailure to call an ambulance for almost two hours while [prisoner] lay unconscious and vomiting rises to the level of deliberate indifference.”).

example, in *Gates v. Cook*, the Fifth Circuit said that prison officials cannot ignore serious mental health risks for prisoners on Death Row. Before this case, inmates were kept in conditions of isolation and poor hygiene. They were also rarely seen by medical staff and had their medication monitored only occasionally.<sup>23</sup>

It may be harder to show deliberate indifference if you were diagnosed incorrectly. An incorrect diagnosis does not by itself prove deliberate indifference. This means that it is not enough to show that prison officials did not diagnose you as having severe depression. Nor is it enough to show that your treatment has been unsuccessful.<sup>24</sup> In addition, it is not enough to show that you disagreed with prison officials about what treatment is appropriate for you.<sup>25</sup> Rather, you must demonstrate that:

- 1) You had a medical need;
- 2) The denial of treatment was much more likely than not to result in serious medical consequences; and
- 3) Prison officials had sufficient knowledge of your need, so that the denial of medical care constituted an unjustifiable disregard of your rights.<sup>26</sup>

This test mostly applies to cases of physical injury. If you were wrongly denied psychiatric care, you will need to provide some additional information. In the Fifth Circuit, courts balance a number of factors in deciding whether a prisoner was unconstitutionally denied psychiatric care:<sup>27</sup>

- 1) The seriousness of the prisoner's illness;
- 2) The need for immediate treatment;
- 3) The length of the prisoner's sentence;
- 4) The possibility of substantial harm caused by delayed treatment;
- 5) The possibility or likelihood of some cure or substantial improvement in the prisoner's condition;
- 6) The extent to which the prisoner presents a risk of danger to himself or other prisoners;
- 7) The availability and cost of providing psychiatric treatment; and
- 8) The effect of such unusual care on ordinary [prison] administration.<sup>28</sup>

You will also need to show that your need for psychiatric care is a medical necessity. This means that the court will only consider services you need.<sup>29</sup> To set out a case of medical necessity, you will need to show:

- 1) Prior psychiatric illness or treatment,
- 2) Expert medical opinion, or
- 3) Behavior that indicates psychiatric illness.<sup>30</sup>

This evidence should make it reasonable for the court to believe that you need psychiatric treatment for your health and well-being.<sup>31</sup> In addition, the factors listed above are not the only factors

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<sup>22</sup> *Gates v. Cook*, 376 F.3d 323, 343 (5th Cir. 2004).

<sup>23</sup> *Gates v. Cook*, 376 F.3d 323, 343 (5th Cir. 2004).

<sup>24</sup> *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985).

<sup>25</sup> *Norton v. Dimazana*, 122 F.3d 286, 292 (5th Cir. 1997) ("Disagreement with medical treatment does not state a claim for Eighth Amendment indifference to medical needs.").

<sup>26</sup> *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985).

<sup>27</sup> *Woodall v. Foti*, 648 F.2d 268, 272 (5th Cir. 1981).

<sup>28</sup> *Woodall v. Foti*, 648 F.2d 268, 272 (5th Cir. 1981).

<sup>29</sup> *Woodall v. Foti*, 648 F.2d 268, 272 (5th Cir. 1981) ("In balancing the needs of the prisoner against the burden on the penal system . . . the essential test is one of medical necessity and not one simply of desirability.").

<sup>30</sup> *Woodall v. Foti*, 648 F.2d 268, 273 (5th Cir. 1981) ("The complaint must allege enough facts of prior psychiatric illness or treatment, of expert medical opinion, or of behavior clearly evincing some psychiatric ill to create a reasonable ground to believe that psychiatric treatment is necessary for his continued health and well-being.")

<sup>31</sup> *Woodall v. Foti*, 648 F.2d 268, 273 (5th Cir. 1981).

that courts will consider. Because each case will have different facts, the courts will review each prisoner's case individually.<sup>32</sup>

#### D. TRANSFER FOR TREATMENT

Many treatments are available for prisoners with mental illness. Sometimes these treatments must be administered at a location outside of the prison. The Louisiana Department of Corrections ("LDOC") has the power to provide mental health treatment for prisoners within their own facilities. LDOC also has power to transfer prisoners to a separate facility.<sup>33</sup> A transfer for treatment of mental illness may involve commitment to a psychiatric treatment center.

A prisoner may voluntarily apply to transfer for treatment. In other cases, a prisoner may be committed to a treatment center involuntarily. Before you can be involuntarily committed, LDOC must follow certain standards and procedures. If these procedures and standards are not met, then your due process rights may be violated.<sup>34</sup> This Section discusses your rights if you refuse to be transferred for treatment.

It is important to remember that this Chapter is written for prisoners who have developed or suffered from mental illness **while in prison**. It does not address the separate issue of insanity acquitees, or people who had a mental illness at the time they were convicted. Insanity acquitees are subject to different procedures for commitment.<sup>35</sup>

##### 1. Commitment of Prisoners

###### a. Judicial Commitment

Under Louisiana law, the procedures for committing mentally ill prisoners are the same as for committing any other person for psychiatric treatment.<sup>36</sup> This means that you must be given the same rights as non-prisoners before you can be committed to a psychiatric treatment center.<sup>37</sup> In order to be committed, the party trying to commit you must show:

- 1) That you are suffering from a mental illness, and
- 2) That your mental illness makes you a danger to yourself or others.<sup>38</sup>

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<sup>32</sup> Woodall v. Foti, 648 F.2d 268, 272 (5th Cir. 1981) (the court "should take into account a number of competing considerations").

<sup>33</sup> LA. REV. STAT. ANN. § 15:830(A) (2017) ("The department may establish resources and programs for the treatment of mentally ill and mentally retarded inmates, either in a separate facility or as part of other institutions or facilities of the department.").

<sup>34</sup> Vitek v. Jones, 445 U.S. 480, 488, 100 S. Ct. 1254, 1261, 63 L. Ed. 2d 552, 561–562 (1980) ("We have repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment.").

<sup>35</sup> LA. REV. STAT. ANN. § 28:59(A) (2017) ("Any person acquitted of a crime by reason of insanity or mental defect may be committed to the proper institution in accordance with Code of Criminal Procedure Arts. 654 et. Seq.").

<sup>36</sup> LA. REV. STAT. ANN. § 28:59(C) (2017) ("Any person serving a sentence who develops a mental illness may be committed to the proper institution in the manner provided for judicial commitment by the district court of the place of incarceration . . ."); LA. REV. STAT. ANN. § 15:830(B) (2017) ("If the inmate is found to be subject to civil commitment for psychosis or other mental illness or retardation, the secretary of the Department of Corrections shall initiate legal proceedings for such commitment.").

<sup>37</sup> LA. REV. STAT. ANN. § 15:830(B) (2017) ("If the inmate is found to be subject to civil commitment for psychosis or other mental illness or retardation, the secretary of the Department of Corrections shall initiate legal proceedings for such commitment.").

<sup>38</sup> LA. REV. STAT. ANN. § 28:54(A) (2017) ("Any person of legal age may file with the court a petition which asserts his belief that a person is suffering from mental illness which contributes or causes that person to be a danger to himself or others . . ."); LA. REV. STAT. ANN. § 28:55(E)(1) (2017) ("If the court finds by clear and convincing evidence that the respondent is dangerous to self or others . . . as a result of a substance-related or addictive disorder or mental illness, it shall render a judgment for his commitment."); Jackson v. Foti, 670 F.2d 516, 521 (5th Cir. 1982) ("[B]efore judicial commitment is permitted, Louisiana requires a dual finding: the person is mentally ill and poses a danger to self or others.").

This judgment must be made in a court hearing.<sup>39</sup> You are entitled to a number of procedural rights in this hearing, including your right to:

- 1) Reasonable notice of the hearing;
- 2) Be present at the hearing;
- 3) Have your counsel present, or if you are unable to afford counsel, to have counsel appointed to represent you; and
- 4) Present evidence and cross-examine witnesses testifying at the hearing.<sup>40</sup>

Before the hearing, the court will appoint a doctor to examine you.<sup>41</sup> After the examination, the doctor will state in a written report the specific reasons for the finding that you are in need of involuntary commitment and treatment.<sup>42</sup> By law, this report must be given to your lawyer at least three days before the hearing.<sup>43</sup> You have the right to “seek an additional independent medical opinion.”<sup>44</sup> If you are unable to pay for it, you may have the right to have this additional opinion paid for by the Mental Health Advocacy Service.<sup>45</sup>

At the hearing, the state will present its witnesses and evidence first.<sup>46</sup> After the state's evidence has been presented, you or your lawyer will have the opportunity to present evidence.<sup>47</sup> You will also have the opportunity to cross-examine any witnesses who testified.<sup>48</sup> In order to have you committed, the state must prove by *clear and convincing* evidence that you are dangerous to yourself or others as a result of mental illness.<sup>49</sup> The clear and convincing standard of evidence is higher than a “more likely than not” standard but lower than the “beyond a reasonable doubt” standard used in criminal trials.<sup>50</sup>

If you are involuntarily committed for psychiatric treatment, the court must review that commitment periodically.<sup>51</sup> Under Louisiana law, judicial commitment orders expire after 180 days.<sup>52</sup> This means that after 180 days, you are entitled to another hearing. In order to commit you again, the court must again find that you are dangerous to yourself or others as a result of mental illness.<sup>53</sup> In this re-hearing, you must be given all of the same rights as you were in the first hearing.<sup>54</sup> You should note, however, that if you have been committed by the court four or more times in a row, you are only entitled to a re-hearing once per year, instead of every 180 days.<sup>55</sup>

In addition to the required periodic reviews of your commitment, you also have the right to appeal your judicial commitment in the court of appeal.<sup>56</sup>

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<sup>39</sup> LA. REV. STAT. ANN. § 28:54(C) (2017) (“Upon the filing of the petition, the court shall assign a time, not later than eighteen calendar days thereafter, shall assign a place for a hearing upon the petition . . .”); LA. REV. STAT. ANN. § 28:55(A) (2017) (“At the appointed time, the court shall conduct a hearing on the petition.”).

<sup>40</sup> LA. REV. STAT. ANN. § 28:54(C) (2017); LA. REV. STAT. ANN. § 28:55(C) (2017); LA. REV. STAT. ANN. § 28:55(D) (2017).

<sup>41</sup> LA. REV. STAT. ANN. § 28:54(D)(1) (2017).

<sup>42</sup> LA. REV. STAT. ANN. § 28:54(D)(1) (2017).

<sup>43</sup> LA. REV. STAT. ANN. § 28:54(D)(1) (2017).

<sup>44</sup> LA. REV. STAT. ANN. § 28:54(D)(2) (2017).

<sup>45</sup> LA. REV. STAT. ANN. § 28:54(D)(2) (2017).

<sup>46</sup> LA. REV. STAT. ANN. § 28:55(D) (2017).

<sup>47</sup> LA. REV. STAT. ANN. § 28:55(D) (2017).

<sup>48</sup> LA. REV. STAT. ANN. § 28:55(D) (2017).

<sup>49</sup> LA. REV. STAT. ANN. § 28:55(E)(1) (2017).

<sup>50</sup> *In re M.M.*, 42-899, p. 3 (La. App. 2 Cir. 11/21/07); 969 So. 2d 835, 837 (holding that under the clear and convincing evidence standard, “the existence of the disputed fact must be highly probable, or much more probable than not”).

<sup>51</sup> LA. REV. STAT. ANN. § 28:56(A)(2)(b) (2017).

<sup>52</sup> LA. REV. STAT. ANN. § 28:56(A)(1)(a) (2017).

<sup>53</sup> LA. REV. STAT. ANN. § 28:56(A)(1)(a) (2017).

<sup>54</sup> LA. REV. STAT. ANN. § 28:56(A)(2)(a) (2017).

<sup>55</sup> LA. REV. STAT. ANN. § 28:56(A)(1)(b) (2017).

<sup>56</sup> LA. REV. STAT. ANN. § 28:56(D) (2017).

### b. Admission by Emergency Certificate

Typically, you have a right to a hearing **before** being committed. However, under certain circumstances, you may be transferred for observation, diagnosis and treatment without having a hearing first.<sup>57</sup> If a doctor, mental health nurse, or psychologist determines that you need *immediate* treatment, you may be transferred on the basis of an **emergency certificate**.<sup>58</sup> An emergency certificate allows for your immediate transfer to a treatment facility. If you are committed by emergency certificate, you cannot be committed for more than fifteen days.<sup>59</sup>

In order to issue an emergency certificate, a doctor, mental health nurse, or psychologist must actually examine you.<sup>60</sup> Once an examination has taken place, an emergency certificate must be issued within seventy-two hours.<sup>61</sup> The certificate must specifically explain why the doctor, nurse or psychologist believes you are dangerous to yourself or others because of mental illness.<sup>62</sup> It must also explain why you need immediate care and treatment.<sup>63</sup>

You have the right to challenge your emergency confinement in a judicial hearing.<sup>64</sup> Once a request has been made, a hearing must be held within five days.<sup>65</sup> In order to hold you in the treatment facility for longer than fifteen days, the state must go through the process for judicial commitment that is detailed above in Part D(1)(a) of this Chapter.<sup>66</sup>

### c. Effect of Commitment on Sentence Time

By state law, if you are committed for psychiatric treatment, the period of commitment must be credited against your sentence.<sup>67</sup> This means that if your sentence is ten years, and you spend two years under judicial commitment, those two years of commitment count towards your ten-year sentence.

## E. UNWANTED TREATMENT

While Part C above focused on your right to receive medical treatment for your mental illness, this Part discusses when you may be able to refuse treatment that you do not want. You should also read Part C(2) of Chapter 29 of the main *JLM*, “Special Issues for Prisoners with Mental Illness,” as well as Part C(5)(a) of Chapter 23 of the main *JLM*, “Your Right to Adequate Medical Care.” You should always keep in mind, however, that not all of the law in the main *JLM* will apply to you, and you should also read the state law discussed in this Chapter.

Louisiana law limits your right to refuse treatment for mental illness. If you are mentally ill, you may be medicated over your objection if a doctor or psychiatrist finds that such treatment is necessary to prevent harm or injury to yourself or to other prisoners.<sup>68</sup> Even if a doctor or psychiatrist finds that you need to be treated against your will, that treatment cannot last longer than fifteen days.<sup>69</sup>

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<sup>57</sup> LA. REV. STAT. ANN. § 28:53(A)(1) (2017).

<sup>58</sup> LA. REV. STAT. ANN. § 28:53(B)(1) (2017).

<sup>59</sup> LA. REV. STAT. ANN. § 28:53(A)(1) (2017).

<sup>60</sup> LA. REV. STAT. ANN. § 28:53(B)(1) (2017).

<sup>61</sup> LA. REV. STAT. ANN. § 28:53(B)(3) (2017).

<sup>62</sup> LA. REV. STAT. ANN. § 28:53(B)(2) (2017).

<sup>63</sup> LA. REV. STAT. ANN. § 28:53(B)(2) (2017).

<sup>64</sup> LA. REV. STAT. ANN. § 28:53(D) (2017).

<sup>65</sup> LA. REV. STAT. ANN. § 28:53(D) (2017).

<sup>66</sup> LA. REV. STAT. ANN. § 28:2(32)(b) (2017) (“patients in custody of the Department of Public Safety and Corrections may be admitted to forensic facilities by emergency certificate provided that judicial commitment proceedings are initiated during the period of treatment at the forensic facility authorized by emergency certificate”).

<sup>67</sup> LA. REV. STAT. ANN. § 28:59(C) (2017); LA. REV. STAT. ANN. § 15:830(B) (2017); *Jennings v. Hunt*, 272 So. 2d 333, 334–335 (La. 1973) (“If, as a result of the Louisiana sentence, the prisoner had been confined in a Louisiana mental institution . . . the period of commitment therein by our own state law must be credited against the sentence imposed by the court.”).

<sup>68</sup> LA. REV. STAT. ANN. § 15:830.1(A) (2017).

<sup>69</sup> LA. REV. STAT. ANN. § 15:830.1(A) (2017).

After fifteen days, you have a right to a court hearing. In order to continue treating you involuntarily, the state must file a petition with the court describing the reasons that further treatment is required.<sup>70</sup> At the hearing, you have the right to be represented by a lawyer.<sup>71</sup> If you do not have a lawyer, the court will appoint one for you.<sup>72</sup> After the hearing, the judge will determine if you are competent to refuse treatment. If the judge finds that you are not competent as a result of mental illness, then he will order that treatment continue to be provided.<sup>73</sup>

By law, in hearings for involuntary treatment, you must be given all of the same procedural rights that are provided in judicial commitments, as discussed above in Part D(1)(a).<sup>74</sup>

## F. CONCLUSION

This Chapter explains your rights as a prisoner with mental illness. It covers the basic information you will need to understand how the law applies to prisoners with mental illness, your right to receive treatment for mental illness, and your limited right to refuse unwanted treatment and transfer.

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<sup>70</sup> LA. REV. STAT. ANN. § 15:830.1(A) (2017). You should note that once a petition has been filed the state has the right to continue treating you while a hearing is pending. LA. REV. STAT. ANN. § 15:830.1(A) (2017).

<sup>71</sup> LA. REV. STAT. ANN. § 15:830.1(A) (2017).

<sup>72</sup> LA. REV. STAT. ANN. § 15:830.1(A) (2017).

<sup>73</sup> LA. REV. STAT. ANN. § 15:830.1(A) (2017).

<sup>74</sup> LA. REV. STAT. ANN. § 15:830.1(C) (2017) (“Commitments pursuant to this Section shall be in accord with all procedures required by law in the case of judicial commitment.”).

# CHAPTER 17: SPECIAL CONSIDERATIONS FOR SEX OFFENDERS\*

## A. INTRODUCTION

This Chapter contains information specifically regarding sex offenders in Louisiana who are serving time in prison. Most sex crimes are covered in Title 14, Chapter 1 of the Louisiana Revised Statutes.<sup>1</sup> Because sex offenses vary in seriousness, they can be either misdemeanors or felonies. This Chapter deals with issues that are relevant to both types. Louisiana uses broad definitions for misdemeanors and felonies, unlike other states, which use different classes of offenses. In Louisiana, a felony is defined as “any crime for which an offender may be sentenced to death or imprisonment at hard labor[.]”<sup>2</sup> while a misdemeanor is simply any crime that is not a felony.<sup>3</sup> None of the crimes discussed in this Chapter are punishable by death.<sup>4</sup>

Louisiana classifies some sex crimes as “Offenses Against the Person,” found in Part II of Chapter 1 of the Louisiana Revised Statutes, and others as “Offenses Affecting Public Morals,” found in Part V of Chapter 1. The crimes in Part II can be categorized as rape and sexual battery, while Part V deals more with prostitution and crimes involving juveniles. All of the crimes in Part II are considered felonies because they may be punishable by hard labor. Many of the crimes listed in Part V are also felonies, but some are misdemeanors. Some of these become felonies only after more than one offense. Each section describing a crime also lists the sentencing guidelines, so you should check it to see if the crime you have been convicted of is a felony or not.

If you are in prison for any of the sex crimes mentioned above, you should be mindful of issues that are unique to you. This Chapter is intended to provide you with some background and resources concerning those special matters. It is, however, important to keep in mind that laws are constantly changing. While this Chapter attempts to explain current law as accurately as possible, you should be aware that laws do change, and the laws may be different a year, or even a month from now. It is also important to remember that some sex offender laws only apply to certain kinds of sex offenses. For example, there might be a law that applies to those convicted of sexual battery but not to those guilty of sexting. While this Chapter attempts to highlight the major examples where this is true, you should read all relevant statutes carefully to determine whether a particular section actually applies to you.

This Chapter begins with a discussion of protective custody, also known as “extended lockdown” in Louisiana. That discussion is followed by an overview of treatment available to sex offenders. The rest of the Chapter provides information regarding registration requirements for sex offenders.

## B. PROTECTIVE CUSTODY

It is possible that other prisoners may target you for abuse if they discover that you were convicted of a sex offense. If you have reasons to fear for your safety, you may wish to consider requesting protective custody while in prison. Being placed on protective custody allows you to be separated from the general prison population.

In Louisiana, you may request protective custody (also called “extended lockdown”) by submitting a signed written request. A hearing before the disciplinary board is not necessary if you submit this request. After you are placed in protective custody, a classification board should review you for possible release to a less restricted status at least every seven days for the first two months and every 30 days

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\* This supplement chapter was written by Raquel Toledo.

<sup>1</sup> LA. REV. STAT. ANN. § 14 (2017).

<sup>2</sup> LA. REV. STAT. ANN. § 14:2(A)(4) (2017).

<sup>3</sup> LA. REV. STAT. ANN. § 14:2(A)(6) (2017).

<sup>4</sup> Until recently, aggravated rape carried the possibility of capital punishment, or the death sentence. This was ruled unconstitutional in *Kennedy v. Louisiana*, 554 U.S. 407, 413, 128 S. Ct. 2641, 2642, 171 L. Ed. 2d 525 (2008), *opinion modified on denial of reh'g*, 554 U.S. 945, 129 S. Ct. 1, 171 L. Ed. 2d 932 (2008) (holding that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim).



thereafter.<sup>5</sup> You should remember that administrative segregation is a protection that is provided at your request, with the aim to ensure your safety. You should not confuse it with being placed in solitary confinement, which is one of the punishments for a serious offense committed in prison.

Before requesting protective custody, you should consider several things. Because protective custody is essentially a form of being separated from the general population of the prison, you need to weigh the pros and cons of such an arrangement. Protective custody will keep you safer, but it will also limit your movement in the prison, as well as your ability to take advantage of all prison resources and activities. Protective custody may also limit the full extent of your visitation rights. For example, it might place you on non-contact visitation status. Because these regulations vary by facility, you should thoroughly read the prisoner manual at your facility for details.

You have a right to be free from assault by other prisoners, and the state has a duty to protect you and your property, regardless of whether or not you are in protective custody.<sup>6</sup> This right stems from the Eighth Amendment to the United States Constitution.<sup>7</sup> If you do find yourself the victim of abuse, you might consider bringing legal action against the relevant parties (people or agencies responsible). For guidance on when you have a legitimate cause of action and how to pursue legal action in that case, please read Chapter 10, “The State’s Duty to Protect You and Your Property: Tort Action,” and Chapter 7, “Your Right to be Free from Assault by Prison Guards and Other Prisoners,” of the *Louisiana State Supplement*. Further information can also be found in Chapters 17 and 24 of the main *JLM*, but keep in mind that those Chapters may not correctly describe the state of the law in Louisiana.

### C. SEX OFFENDER REHABILITATION PROGRAMS

Many correctional facilities offer group treatment for sex offenders. There is no publicly available list of such programs, so you should check your prisoner manual or ask the staff of your facility about available programs. If there are classes available, you should take them. A demonstrated commitment to rehabilitation will reflect well on you if you seek parole or probation.

In Louisiana, treatment is mandatory for certain offenders if they wish to be eligible for parole or probation. You must seek treatment to be eligible for parole if (1) your victim was a child of 12 years of age or younger, or (2) you were convicted two or more times of one of the enumerated violations.<sup>8</sup> Even if you are not eligible for or are not seeking parole, the court may order you to undergo treatment if you have been convicted of an enumerated offense.<sup>9</sup> This is true even if you are a first-time offender.

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<sup>5</sup> LA. ADMIN. CODE tit. 22, pt. I, § 341 (2017).

<sup>6</sup> *Longoria v. Texas*, 473 F.3d 586, 592 (5th Cir. 2006) (“It is well established that prison officials have a constitutional duty to protect prisoners from violence at the hands of their fellow inmates.”).

<sup>7</sup> U.S. CONST. amend. VIII. For a discussion of circumstances when prison officials can be held responsible for assault by other prisoners, see *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d. 811 (1994).

<sup>8</sup> These crimes are listed in LA. ADMIN. CODE tit. 22, pt. I, § 337(E)(1) (2017). They include:

Aggravated rape (R.S. 14:42);

Forcible rape (R.S. 14:42.1);

Simple rape (R.S. 14:43);

Sexual battery (R.S. 14:43.1);

Second degree sexual battery (R.S. 14:43.2);

Oral sexual battery (R.S. 14:43.3);

Incest (R.S. 14:78);

Aggravated incest (R.S. 14:78.1);

Crime against nature (R.S. 14:89(A)(2));

Aggravated crime against nature (R.S. 14:89.1).

<sup>9</sup> These crimes are listed in LA. ADMIN. CODE tit. 22, pt. I, § 337(G)(1) (2017). They include:

Aggravated rape (R.S. 14:41);

Forcible rape (R.S. 14:42.1);

Second degree sexual battery (R.S. 14:43.2);

Aggravated incest (R.S. 14:78.1);

Molestation of a juvenile when the victim is under the age of 13 (R.S. 14:81.2(D)(1));

Aggravated crime against nature (R.S. 14:89.1).

In order to determine your treatment plan, you are required to undergo a psychological evaluation. You are responsible for paying for the psychological evaluation and the treatment, and the Department of Corrections has the right to determine the eligibility of the service provider.<sup>10</sup> If you are already on parole or probation and you are indigent, or unable to pay for treatment, services may be available to you through the Office of Mental Health at the Louisiana Department of Health and Hospitals. You should ask your parole or probation officer to help you access these services. If you are incarcerated and indigent, you should contact the mental health staff of your facility. They can tell you more about setting up a payment plan to cover your treatment.

Treatment may involve some type of behavioral therapy, and it usually involves administration of a chemical called medroxyprogesterone acetate (MPA), or another similar chemical. MPA treatment is commonly referred to as “chemical castration” because it inhibits your libido (sex drive) and your body’s ability to become sexually aroused. MPA has the potential to cause side effects, and medical personnel are required to inform you of all of them and make sure you understand before you can consent to treatment.<sup>11</sup> You should ask the medical provider any questions you have about the effects that the chemical might have on your body. Chemical castration for sex offenders is a controversial practice, but it is the law in Louisiana and in eight other states.<sup>12</sup>

An alternative to chemical castration is physical castration, sometimes called surgical castration. Whereas the effects of chemical castration may be reversible, physical castration is permanent because it involves the removal of your testes (if you are male) or ovaries (if you are female). A court may order you to undergo a physical castration, but it can only be done with your written voluntary consent.<sup>13</sup> You should think very carefully about this decision after discussing it with your medical provider. You should note that undergoing chemical or physical castration would not reduce or replace any part of your sentence.<sup>14</sup>

#### D. REGISTRATION AND NOTIFICATION LAWS IN LOUISIANA

The Sex Offender Registration and Notification Act (SORNA) is a federal law passed by Congress in 2006 establishing a national system for sex offender registration.<sup>15</sup> Under this Act, states must notify the sex offender about how and when to register and annually verify the offender’s address.<sup>16</sup> In addition, the Act requires states to set up a system for community notification.<sup>17</sup> For more information about what federal law requires states to do, refer to Chapter 36 of the main *JLM*.

Louisiana’s sex offender registration law is detailed in Title 15, Chapter 3-B of the Louisiana Revised Statutes Annotated. This Section explains whom this law covers and what kinds of duties you have if the law applies to you. While the *JLM* tries to provide the most updated information, you should check the statutes for yourself, as sex offender laws change fairly often in Louisiana.

##### 1. Who Needs to Register?

###### a. Generally

In general, any adult residing in Louisiana who has pled guilty to or been convicted of committing, attempting to commit, or planning to commit a sex offense must register for the State Sex Offender & Child Predator Registry (SOCPR). You must also register if judgment by the court has been

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<sup>10</sup> LA. ADMIN. CODE tit. 22, pt. I, § 337(E)(12) (2017).

<sup>11</sup> LA. ADMIN. CODE tit. 22, pt. I, § 337(E)(11) (2017).

<sup>12</sup> LA. STAT. ANN. § 14:43.6 (2017); Charles L. Scott, MD, & Trent Holmberg, MD, *Castration of Sex Offenders: Prisoners’ Rights Versus Public Safety*, 31 J. AM. ACAD. PSYCHIATRY L. 502, 504 (2003).

<sup>13</sup> LA. ADMIN. CODE tit. 22, pt. I, § 337(G)(2) (2017).

<sup>14</sup> LA. ADMIN. CODE tit. 22, pt. I, § 337(G)(2) (2017).

<sup>15</sup> 34 U.S.C. § 20912 (2012).

<sup>16</sup> 34 U.S.C. § 20919 (2012).

<sup>17</sup> 34 U.S.C. § 20923 (2012).

postponed or withheld in your case.<sup>18</sup> Juveniles over the age of fourteen may also be required to register as sex offenders in certain cases. Specifically, a juvenile fourteen or older must register if he has pled guilty to or been convicted of a sex offense,<sup>19</sup> even if it occurred in another state or jurisdiction. A juvenile must also register if he has been judged delinquent because he committed, attempted to commit, or planned to commit one of the offenses listed in La. Rev. Stat. Ann. § 15:542(A)(3).<sup>20</sup>

You should note that different registration requirements apply if you have been convicted of prostitution or Crimes Against Nature by Solicitation (CANS). Those requirements are discussed in Section 4 below.

## 2. Offenses Triggering the Sex Offender Registration Law

The term “sex offense” includes a number of different crimes, most of which require convicted persons to register as sex offenders. There are also a number of offenses that do not necessarily involve sexual conduct that require sex offender registration because the victim was a minor child. There are also different rules for when convicted minors must register, versus convicted adults. An adult must register as a sex offender if he has committed the following crimes:<sup>21</sup>

- 1) A “sex offense”<sup>22</sup> as defined by La. Rev. Stat. Ann. § 15:541(24);<sup>23</sup> and
- 2) A “criminal offense against a victim who is a minor” as defined by La. Rev. Stat. Ann. § 15:541(12).

“Criminal offense against a victim who is a minor” includes a variety of crimes, and it can be complicated to figure out which crimes fall into this category if you are reading the statute. Here is a list of which offenses are included in this category, and thus require the person convicted to register as a sex

<sup>18</sup> LA. REV. STAT. ANN. § 15:542(A)(1) (2017).

<sup>19</sup> LA. REV. STAT. ANN. § 15:542(A)(2). Except for simple rape, defined in LA. REV. STAT. ANN. § 14:43 (2017).

<sup>20</sup> Aggravated rape (R.S. 14:42).

Forcible rape (R.S. 14:42.1).

Second degree sexual battery (R.S. 14:43.2).

Aggravated kidnapping of a child who has not attained the age of thirteen years (R.S. 14:44).

Second degree kidnapping of a child who has not attained the age of thirteen years (R.S. 14:44.1).

Aggravated crime against nature (defined by R.S. 14:89.1(A)(2)) involving circumstances defined as an “aggravated offense” (defined by R.S. 15:541).

Aggravated crime against nature (R.S. 14:89.1).

An offense under the laws of another state, or military, territorial, foreign, tribal, or federal law that is equivalent to the offenses listed in Subparagraphs (a) through (g) of this Paragraph.

<sup>21</sup> LA. REV. STAT. ANN. § 15:542(A) (2017).

<sup>22</sup> “Sex offense” means deferred adjudication, adjudication withheld, or conviction for the perpetration or attempted perpetration of or conspiracy to commit human trafficking when prosecuted under the provisions of R.S. 14:46.2(B)(2) or (3), R.S. 14:46.3 (trafficking of children for sexual purposes), R.S. 14:89 (crime against nature), R.S. 14:89.1 (aggravated crime against nature), R.S. 14:89.2(B)(3) (crime against nature by solicitation), R.S. 14:80 (felony carnal knowledge of a juvenile), R.S. 14:81 (indecent behavior with juveniles), R.S. 14:81.1 (pornography involving juveniles), R.S. 14:81.2 (molestation of a juvenile or a person with a physical or mental disability), R.S. 14:81.3 (computer-aided solicitation of a minor), R.S. 14:81.4 (prohibited sexual conduct between an educator and student), R.S. 14:82.1 (prostitution; persons under eighteen), R.S. 14:82.2(C)(4) and (5) (purchases of commercial sexual activity), R.S. 14:92(A)(7) (contributing to the delinquency of juveniles), R.S. 14:93.5 (sexual battery of persons with infirmities), R.S. 14:106(A)(5) (obscenity by solicitation of a person under the age of seventeen), R.S. 14:283 (video voyeurism), R.S. 14:41 (rape), R.S. 14:42 (aggravated or first degree rape), R.S. 14:42.1 (forcible or second degree rape), R.S. 14:43 (simple or third degree rape), R.S. 14:43.1 (sexual battery), R.S. 14:43.2 (second degree sexual battery), R.S. 14:43.3 (oral sexual battery), R.S. 14:43.5 (intentional exposure to AIDS virus), or a second or subsequent conviction of R.S. 14:283.1 (voyeurism), committed on or after June 18, 1992, or committed prior to June 18, 1992, if the person, as a result of the offense, is under the custody of the Department of Public Safety and Corrections on or after June 18, 1992.” LA. REV. STAT. ANN. § 15:541(24)(a) (2017). Note that, although “crime against nature by solicitation” is a sex offense, it no longer requires convicted persons to register as sex offenders. For more information, see section D(4) on prostitution and CANS offenses.

<sup>23</sup> Under certain circumstances, the court may waive the registration requirement for an individual convicted of felony carnal knowledge of a juvenile. The victim has to have been at least 13 years old, and the person convicted cannot have been more than 4 years older than the victim at the time of the crime. LA. REV. STAT. ANN. § 15:542(F) (2017).

offender:

- 1) The following offenses are considered a “criminal offense against a victim who is a minor” when the victim is under 18 years of age and is not the child of the person convicted: R.S. 14:44 (aggravated kidnapping), R.S. 44.1 (second degree kidnapping), R.S. 44.2 (aggravated kidnapping of a child), R.S. 45 (simple kidnapping), R.S. 45.1 (interference with the custody of a child), R.S. 46 (false imprisonment), or R.S. 46.1 (false imprisonment; offender armed with a dangerous weapon).<sup>24</sup>
- 2) The following offenses are considered a “criminal offense against a victim who is a minor” when the victim is under 18 years of age: R.S. 14:82.1 (Prostitution; persons under eighteen; additional offenses),<sup>25</sup> R.S. 14:84(1) (pandering; enticing, placing, persuading, encouraging, or causing the entrance of any person into the practice of prostitution, either by force, threats, promises, or by any other device or scheme), R.S. 14:84(3) (pandering; Detaining any person in any place of prostitution by force, threats, promises, or by any other device or scheme), R.S. 14:84(5) (pandering; consenting, on the part of any parent or tutor of any person, to the person’s entrance or detention in the practice of prostitution), R.S. 14:86 (transporting any person from one place to another for the purpose of promoting the practice of prostitution), R.S. 14:86 (enticing persons into prostitution), R.S. 23:251(A)(4) (employing, exhibiting, using, or training a minor under 16 for the purpose of exhibition in any practice, exhibition, or place dangerous or injurious to the life, limbs, health, or morals of the minor), or R.S. 14:46.2 (human trafficking, or knowingly benefitting from human trafficking).<sup>26</sup>
- 3) The following offenses are considered a “criminal offense against a victim who is a minor” when the prostitution involves a person under 18 years of age: R.S. 14:83 (soliciting for prostitutes), R.S. 14:83.1 (inciting prostitution), R.S. 14:83.2 (promoting prostitution), or R.S. 14:282 (operation of a place of prostitution).<sup>27</sup>

### 3. Exemptions

Two narrow categories of people are exempt from having to register as sex offenders. The first category applies to people convicted of sexual activity with a juvenile.<sup>28</sup> The second category of people exempt from registering as sex offenders are those convicted of Crimes Against Nature by Solicitation (CANS). This is a recent development in the law based on the 2012 case of *Doe v. Jindal*.<sup>29</sup> This exemption is detailed in Section 4 below.

### 4. Prostitution and CANS Convictions

Prior to 2012, Louisiana had different registration requirements for people who had been convicted of Prostitution and people who had been convicted of Crimes Against Nature by Solicitation (CANS). Prostitution refers to the solicitation of any kind of sex, including vaginal, anal, and oral, for compensation.<sup>30</sup> CANS is a different statute criminalizing the solicitation of another person with the intent to engage in oral or anal sex for compensation.<sup>31</sup> Prostitution is a misdemeanor, and the convicted person was not required to register as a sex offender on SOCPR. CANS, however, was considered a more serious crime. A second CANS offense was considered a felony, and the crime was punished by larger fines and longer prison sentences than Prostitution. CANS offenders were also required to register as sex offenders on SOCPR. The Louisiana legislature equalized the prison and monetary penalties for the two crimes in 2011,<sup>32</sup> but did not change the SOCPR registration requirements.

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<sup>24</sup> LA. REV. STAT. ANN. §15:541(12)(a) (2017).

<sup>25</sup> LA. REV. STAT. ANN. §15:541(25)(g) (2017).

<sup>26</sup> LA. REV. STAT. ANN. § 15:541(12)(b) (2017).

<sup>27</sup> LA. REV. STAT. ANN. § 15:541(12)(c) (2017).

<sup>28</sup> LA. REV. STAT. ANN. § 14:80 (2017).

<sup>29</sup> *Doe v. Jindal*, 851 F. Supp. 2d 995, 1007 (E.D. La. 2012).

<sup>30</sup> LA. REV. STAT. ANN. § 14:82 (2017).

<sup>31</sup> LA. REV. STAT. ANN. § 14:89.2 (2017).

<sup>32</sup> H.B. 141, 2011 Leg., Reg. Sess. (La. 2011).

That changed in April 2012, when the court held it unconstitutional to require registration for those convicted of CANS, but not for those convicted of Prostitution.<sup>33</sup> The court explained that the differential treatment of people convicted under the different statutes violated the Fourteenth Amendment because the state had no rational basis for treating the two groups differently based on the type of sexual act they engaged in for pay.

In response to the court's decision, the Louisiana legislature amended § 15:542 to allow people convicted of CANS to have their names removed from the sex offender registry.<sup>34</sup> It is important to note that this process is not self-executing (or automatic). Rather, a person convicted of CANS must file papers in court. The main requirements of this process are:

- 1) You must have been convicted of CANS before August 15, 2010.
- 2) The crime that you were convicted of must be one that would have been defined as CANS<sup>35</sup> if you had been convicted after August 15, 2010.
- 3) You may not file this motion if your CANS conviction involved the solicitation of a person under the age of 17 and would authorize sentencing under R.S. § 14:89.2(B)(3)<sup>36</sup> had the person been convicted after August 15, 2010.
- 4) You must include supporting documentation to prove that your CANS conviction meets these requirements.
- 5) You must serve copies of your motion to the district attorney, office of state police, and the Department of Justice.
- 6) You are not eligible for relief if you have been convicted of one or more offenses which otherwise require registration as a sex offender.
- 7) If you have been convicted in another state, you must fulfill certain administrative requirements before filing this motion with the district court of your area of residence. The administrative requirements are found in La. Rev. Stat. Ann. § 15:542.1.3. They involve submitting the court records about the sex offense within a specified time period and submitting periodic updates.

If your supporting documentation meets the requirements, your motion will be granted unless the district attorney provides clear and convincing evidence that the crime of which you were convicted involved a person under the age of 17.<sup>37</sup>

## **5. What Information Goes into the Registry under State Law?**

### **a. Where and When You Must Register**

If you are required to register as a sex offender, you must go in person to the sheriff of your parish of residence.<sup>38</sup> If you live in an incorporated area, like a town, that has a police department, you must also go in person to the chief of police. If you live in a large city of more than 300,000 people, you must also register in person with the police department of the city.<sup>39</sup> If you work or attend school in a different area than where you live, you must also register with the relevant parish sheriff's offices and police departments in these areas.<sup>40</sup> If you attend a college, you must also register with the campus police at least one business day before the school term begins.<sup>41</sup>

In terms of timing, registration must be completed quickly after your relocation to Louisiana or your conviction in a Louisiana court. If you are moving to Louisiana from another jurisdiction, you must

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<sup>33</sup> Doe v. Jindal, 851 F. Supp. 2d 995, 997–999 (E.D. La. 2012).

<sup>34</sup> LA. REV. STAT. ANN. § 15:542(F)(4) (2017).

<sup>35</sup> LA. REV. STAT. ANN. § 14.89.2 (2017).

<sup>36</sup> LA. REV. STAT. ANN. § 14:89.2(B)(3) (2017) specifies punishments for people convicted of CANS when the solicited person is under 18. It also specifies harsher punishments for when the solicited person is under 14 years of age.

<sup>37</sup> LA. REV. STAT. ANN. § 15:542(F)(4) (2017).

<sup>38</sup> If you have multiple residences, you must go to each parish's sheriff's office.

<sup>39</sup> LA. REV. STAT. ANN. § 15:542(B)(1) (2017).

<sup>40</sup> LA. REV. STAT. ANN. § 15:542(B)(2) (2017).

<sup>41</sup> LA. REV. STAT. ANN. § 15:542(B)(1) (2017); LA. REV. STAT. ANN. § 15:542(B)(3) (2017).

appear within three business days of moving there. If you already live in Louisiana, you must register within three business days of your conviction or adjudication if you are not immediately incarcerated or taken into custody. If you are incarcerated or taken into custody immediately after your conviction or adjudication, then you must make sure the right documents are given to either the Department of Public Safety and Corrections or the deputy secretary for youth services, whichever has you in their custody. The documents you need to give are listed below in Section 6. You must submit these documents within ten days before you are released. After you are released, you must appear in person within three business days to register at either the Department of Public Safety and Corrections or youth services, whichever one you gave the documents to.

Note that there is also a fee to register. You must pay \$60 to each agency with which you register (with the exception of campus police) to cover the costs of maintaining your file. This fee must be paid every year on the anniversary of the date that you first registered. If you cannot pay the fee that does not mean you don't have to register. If you are truly unable to pay the fee, the Department of Safety and Corrections may excuse you from paying.<sup>42</sup>

## 6. Information You Must Provide

This is a list of the documentation you must provide when you register as a sex offender with a law enforcement agency:<sup>43</sup>

- 1) Name and any aliases you use.
- 2) Physical address or addresses of residence.
- 3) Name and physical address of place of employment. If you do not have a fixed place of employment, you must provide information with as much specificity as possible regarding the places where you work, including but not limited to travel routes used.
- 4) Name and physical address of the school in which you are a student.
- 5) Two forms of proof of residence for each residential address provided, including but not limited to a driver's license, bill for utility service, and bill for telephone service. If those forms of proof of residence are not available, you may provide an affidavit, or official statement, of an adult resident living at the same address. The person making the affidavit must certify that he understands his obligation to provide written notice to the appropriate law enforcement agency when you, the offender, no longer reside at the residence provided in the affidavit.
- 6) The crime for which you were convicted and the date and place of such conviction. If you know the court in which the conviction was obtained, the docket number of the case, the specific statute under which you were convicted, and the sentence imposed, you should submit that information as well.
- 7) A current photograph.
- 8) Fingerprints, palm prints, and a DNA sample.
- 9) Telephone numbers, including fixed location phone and mobile phone numbers assigned to you or associated with any residence address where you live.
- 10) A description of every vehicle registered to or operated by you, including license plate number and a copy of your driver's license or identification card.
- 11) Social security number and date of birth.
- 12) A description of your physical characteristics, including but not limited to sex, race, hair color, eye color, height, age, weight, scars, tattoos, or other identifying marks on your body.
- 13) Every e-mail address, online screen name, or other online identifiers you have used to communicate on the Internet. Required notice must be given before any online identifier is used to communicate on the Internet.
- 14) Temporary lodging information regarding any place where you plan to stay for seven or more days.
- 15) Travel and immigration documents, including but not limited to passports and documents establishing immigration status.

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<sup>42</sup> LA. REV. STAT. ANN. § 15:542(D) (2017).

<sup>43</sup> LA. REV. STAT. ANN. § 15:542(C)(1) (2017).

## 7. Notifying authorities about changes in your status and address

If you are registered as a sex offender, then you must report any changes of address or long periods of time spent away from your home. You must report these to either the sheriff of your parish or to your police department if you live in a big city. You have three business days to report this information if you do any of the following:<sup>44</sup>

- 1) Change your place of residence or acquire an additional one;
- 2) Leave your place of residence with the intent not to return;
- 3) Are absent from your residence for thirty consecutive days or more than thirty days in the same calendar year; or
- 4) Change your name, place of employment, or other information that you have provided to the authorities.

If you are moving to a new parish, you must appear at the sheriff's office or police station in your new parish within three business days of your move.<sup>45</sup> You do not have to appear in person at the sheriff or police of your former parish, but you must send them written notice with your new address within three business days of your move. When you give notice of your new residence to any law enforcement agencies, you will be required to provide proof of residence.<sup>46</sup> Some common ways to prove your residence include a driver's license, a utility bill, or a phone bill mailed to you at the new address.<sup>47</sup> If you do not have one of these, you may submit an affidavit (or official statement) from an adult living at the same address. In the affidavit, the person must say that they understand their duty to report to the authorities when you no longer live at the address.<sup>48</sup>

If you plan to stay somewhere temporarily for seven days or more, you must report it to your law enforcement agency three days in advance.<sup>49</sup> Note this rule says days, not *business* days like the other provisions. This means that you should count weekends and holidays in figuring out when you need to report. If you are traveling outside the parish where you are registered, your sheriff or police department will notify the sheriff of the parish where you are staying temporarily.<sup>50</sup> If you are traveling out of state, the sheriff will notify the Louisiana Bureau of Criminal Identification and Information, which is the agency responsible for keeping the sex offender registry.

## 8. What Information Is Made Available to the Public?

### a. Your Online Registry Page

The public has access to much of the information you submit when you register as a sex offender in Louisiana. The online database can be accessed by anyone, and they can see your photograph, your name and known aliases, and any known addresses for your home, work, school, or volunteer activities. Your physical description is also available, including your height and weight, age and date of birth, race and sex, eye and hair color, and any distinguishing physical characteristics like scars, tattoos, and birth marks.

Additionally, the registry lists all of your offenses that would require registration as a sex offender. It also says if your offense was attempted or conspiracy to commit an offense. For example, if you were convicted of attempt to commit aggravated rape, it would read "14:42 – Aggravated Rape (attempted)." This includes the date and state where you were convicted and the date of your release. If you are paroled or on probation, the website lists the conditions.

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<sup>44</sup> LA. REV. STAT. ANN. § 15:542.1.2(A) (2017).

<sup>45</sup> LA. REV. STAT. ANN. § 15:542.1.2(B) (2017).

<sup>46</sup> LA. REV. STAT. ANN. § 15:542.1.2(D) (2017).

<sup>47</sup> LA. REV. STAT. ANN. § 15:542(C)(1)(e) (2017).

<sup>48</sup> LA. REV. STAT. ANN. § 15:542(C)(1)(e) (2017).

<sup>49</sup> LA. REV. STAT. ANN. § 15:542.1.2(F)(1) (2017).

<sup>50</sup> LA. REV. STAT. ANN. § 15:542.1.2(F)(2) (2017).

Other information publicly available on the registry includes the information you submit regarding vehicles you own or use. It lists the date that you last presented yourself in person for verification. If you do not comply with the registration rules and have a warrant out for your arrest, that fact is made prominent on your registry page with red lettering and a “WANTED” sign, as well as the date that the warrant was issued.

Finally, your online page in the registry includes the tier assigned to your offense. You can read more about tiers in Section 9 of this Chapter.

#### b. Identifying Yourself as a Sex Offender

Louisiana has strict rules about how you must identify yourself as a sex offender when you use public or online spaces and when you work with or close to minors. You are also required to notify people and businesses in your neighborhood. These requirements are found in § 542.1 and are discussed in this Section.

##### i. *Notice to Neighbors*

You are required to provide notice to at least one person in every residence or business near your home.<sup>51</sup> You must provide them with the following information: the crime for which you were convicted, your name and address, your physical description, and a photo of yourself. If you live in a rural area, this is defined as a one-mile radius (one mile in every direction from your home). If you live in a suburban or urban area, you must provide notice to people and businesses within three tenths of a mile radius. You must also provide notice to every person living in your residence and to your lessor, landlord, or the owner of the property where you live.<sup>52</sup>

Additionally, you must provide notice to the superintendent of the school district where you live, as well as the superintendents of any park, playground, or recreational facility in your area. Those officials will have the responsibility of telling the schools and facilities under their leadership. You should note that your photo, name, address, and the crime for which you were convicted may be posted in conspicuous areas of schools and recreational facilities.<sup>53</sup> You must give notice to schools, recreational facilities, and neighboring homes and businesses within twenty-one days of conviction if you are not taken into custody immediately after, or within twenty-one days of your release from custody or your relocation to Louisiana.<sup>54</sup>

If you provide recreational instruction to people less than seventeen years old, you must post notice in the facility where you do this work.<sup>55</sup> This notice includes a photo, the date and jurisdiction of your conviction, and the crime you were convicted of. Recreational instruction includes lessons or instruction in non-educational activities like martial arts, music, theater, and similar activities.<sup>56</sup>

If you are a juvenile required to register as a sex offender, you do not need to provide notice to anyone except if you provide recreational instruction to children under seventeen. In that case, you should post the same notice as an adult would.<sup>57</sup>

##### ii. *Other Types of Notice*

When you register, you will be given a special sex offender identification card that you must carry on your person at all times. The card has the words “sex offender” in orange capital letters and it is valid for one year. When you return for your annual reregistration and all your information is confirmed, you

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<sup>51</sup> LA. REV. STAT. ANN. § 15:542.1(A)(1)(a) (2017).

<sup>52</sup> LA. REV. STAT. ANN. § 15:542.1(A)(1)(a) (2017); LA. REV. STAT. ANN. § 15:542.1(A)(1)(c) (2017).

<sup>53</sup> LA. REV. STAT. ANN. § 15:542.1(A)(1)(b)(i) (2017); LA. REV. STAT. ANN. § 15:542.1(A)(1)(d) (2017).

<sup>54</sup> LA. REV. STAT. ANN. § 15:542.1(A)(2)(a) (2017).

<sup>55</sup> LA. REV. STAT. ANN. § 15:542.1(B)(1) (2017).

<sup>56</sup> LA. REV. STAT. ANN. § 15:542.1(B)(2) (2017).

<sup>57</sup> LA. REV. STAT. ANN. § 15:542.1(C) (2017).



will receive a new card.<sup>58</sup> In addition to this special card, your driver's license will also be marked with the words "sex offender" in capital orange letters.<sup>59</sup>

At your physical address, you are required to show the number of your address clearly outside your home.<sup>60</sup>

If you use the Internet for networking, you must indicate that you are a sex offender or child predator.<sup>61</sup> A website that is considered a "networking" site for purposes of the statute is one where you would create a profile for the purpose of interacting with other members. It might include photos, names or nicknames, and a way of messaging other users. Examples are sites like Facebook.com, or any dating websites like Match.com. If you use such a website, you must list the crime for which you were convicted, the jurisdiction of conviction, your physical description, and your residential address. Note that "networking website" does not include websites that primarily facilitate commercial transactions (like eBay.com), websites that primarily disseminate news, and government websites.

### 9. How Long Does My Registration Requirement Last?

The amount of time that you must register for depends on the "tier" assigned to your offense. Louisiana groups sex offenses into three tiers. Tier I offenses have a registration period of 15 years.<sup>62</sup> Tier II offenses are more serious than Tier I because they are all crimes committed against minors. If you commit one of these crimes or a crime equal to it in another state when the victim is a minor, you must register for 25 years. Tier III "aggravated" offenses are the most serious. They require you to register for the rest of your life. You are excused from registering only if the underlying conviction is reversed, set aside, or cleared. You are not excused from registering if you are pardoned.

It is possible to reduce the number of years that you must register as a sex offender by maintaining a clean record. You can maintain a clean record by (1) "not being convicted of any offense for which imprisonment for more than one year may be imposed"; (2) "not being convicted of any sex offense"; (3) "successfully completing any periods of supervised release, probation, or parole"; and (4) "successfully completing an appropriate sex offender treatment program by a registered treatment provider as defined in R.S. 24:936 or an appropriate sex offender treatment program certified by the Attorney General of the United States."<sup>63</sup> You must complete each of these steps, not just one or many. If you originally had a registration period of 15 years (for Tier I offenses), then you can lower it to 10 years if you keep a clean record for those first 10 years. If you had a lifetime registration period (for Tier III offenses), you may have it lowered to 25 years if you keep a clean record for 25 years straight. There is no section in the Statute that allows Tier II offenders to lower their registration period.

How often you have to register also changes by the tier. Tier I offenders need to register annually, or once a year. Tier II offenders must register semi-annually, or twice a year. Tier III offenders must register quarterly, or every three months.<sup>64</sup>

Here is a list of each sex offense and the tier to which they belong:<sup>65</sup>

#### a. Tier I Sex Offenses

##### 1) Simple Rape under subsection (3)—14:43(A)(3)

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<sup>58</sup> LA. REV. STAT. ANN. § 40:1321(J)(1) (2017); LA. REV. STAT. ANN. § 40:1321(J)(2) (2017).

<sup>59</sup> LA. REV. STAT. ANN. § 32:412(I)(1) (2017).

<sup>60</sup> LA. REV. STAT. ANN. § 15:542.1(A)(5) (2017).

<sup>61</sup> LA. REV. STAT. ANN. § 15:542.1(D)(1) (2017).

<sup>62</sup> LA. REV. STAT. ANN. § 15:544(A) (2017).

<sup>63</sup> LA. REV. STAT. ANN. § 15:544(E)(3) (2017).

<sup>64</sup> See Louisiana Department of Public Safety & Corrections, *available at* <http://www.lsp.org/socpr/offenses.html> (last visited Sept. 16, 2017).

<sup>65</sup> See Louisiana Department of Public Safety & Corrections, *available at* <http://www.lsp.org/socpr/offenses.html> (last visited Sept. 16, 2017).

- 2) Sexual Battery of Victim 18 and over—14:43.1
- 3) Intentional Exposure to Aids—14:43.5
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- 10) Trafficking of children for sexual purposes—14:46.3
- 11) Aggravated Incest involving sexual intercourse, 2nd degree sexual battery, or oral sexual battery—14:78.1
- 12) Molestation of a juvenile or a person with a physical or mental disability prosecuted under the provisions of R.S. 14:81.2(C)(1), (D)(1), or (D)(2)—14:81.2(E)(1)
- 13) Aggravated Crime Against Nature—14:89.1
- 14) Sexual Battery of the Infirm—14:93.5

## 10. Additional Requirements for Sexually Violent Predators and Child Sexual Predators

At least six months before being released, paroled, or placed on probation, each person convicted of any sex offense must be evaluated by a sex offender assessment panel (SOAP) to determine if he or she should be classified as a sexually violent predator,<sup>66</sup> a child sexual predator,<sup>67</sup> or neither. The panel has three members: a psychologist, an experienced prison warden, and the secretary of the Department of Public Safety and Corrections or someone he or she assigns to take his or her place. The panel will review multiple sources of information, including “presentence reports, prison records, medical and psychological records, information and data gathered by the staffs of the Board of Pardons and the committee on parole, information provided by the convicted offender, the district attorney, and the assistant district attorney, and any other information received by the board and the committee or the Department of Public Safety and Corrections.”<sup>68</sup>

Once the panel has made its decision, it submits a report to the court along with all the evidence it reviewed (the record) and an explanation of the panel's decision.<sup>69</sup> The court will then schedule a hearing and notify you and your lawyer. You have a right to be present at the hearing, to present evidence, and to have a lawyer present.<sup>70</sup> If you cannot afford a lawyer, one will be given to you.<sup>71</sup> If you do not appear or do not provide enough new evidence for the court to consider the panel's determination again, then you will have to comply with the rules for sexually violent predators and sexual predators, found in La. Rev. Stat. Ann. § 15:560.3. The SOAP legal plan has been challenged in court and was upheld as constitutional.<sup>72</sup> If you believe you were wrongfully placed under the category of a sexually violent predator or child sexual predator, you may hand in a petition for review once every 3 years. In order for your petition to be considered, you must be receiving treatment and must show “good cause” for reconsideration of your case.<sup>73</sup>

If you have been put under the category of a sexually violent predator or child sexual predator, you will need to follow the notification rules discussed earlier in this Section, as well as some additional requirements. The most important difference is that you are required to submit to electronic monitoring for the rest of your life.<sup>74</sup> This means that your movements will be tracked and recorded by a GPS system whenever you leave a designated area, usually your home.<sup>75</sup> The system does not track your movements inside your home. This type of system usually works by attaching something to your person, such as an ankle brace, and then transmitting your location to the monitoring system.

In addition to electronic monitoring, you will have a parole officer that you are required to report to when directed to do so.<sup>76</sup> You will be required to send in a plan for living arrangements<sup>77</sup> to your officer and to send in any medical, psychiatric, or mental health evaluation or treatment that the parole officer

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<sup>66</sup> “‘Sexually violent predator’ means an offender who has been convicted of a sex offense as defined in R.S. 15:541 and who has a mental abnormality or antisocial personality disorder that makes the offender likely to engage in predatory sexually violent offenses as determined by the court upon receipt and review of relevant information including the recommendation of the sex offender assessment panel as provided for by this Chapter.” LA. REV. STAT. ANN. § 15:560.1(5) (2017).

<sup>67</sup> “‘Child sexual predator’ means a person who has been convicted of a sex offense as defined in R.S. 15:541 and who is likely to engage in additional sex offenses against children, because he has a mental abnormality or condition which can be verified by a physician or psychologist, or because he has a history of committing crimes, wrongs, or acts involving sexually assaultive behavior or acts which indicate a lustful disposition toward children, as determined by the court upon receipt and review of relevant information including the recommendation by the sex offender assessment panel as provided for by this Chapter.” LA. REV. STAT. ANN. § 15:560.1(1) (2017).

<sup>68</sup> LA. REV. STAT. ANN. § 15:560.2(E) (2017).

<sup>69</sup> LA. REV. STAT. ANN. § 15:560.2(H) (2017).

<sup>70</sup> LA. REV. STAT. ANN. § 15:560.2(I) (2017).

<sup>71</sup> LA. REV. STAT. ANN. § 15:560.2(I) (2017).

<sup>72</sup> *State v. Golston*, 2010-2804, pp. 15–16, 23 (La. 7/1/11); 67 So. 3d 452, 463, 467.

<sup>73</sup> LA. REV. STAT. ANN. § 15:560.5 (2017).

<sup>74</sup> LA. REV. STAT. ANN. § 15:560.3(A)(3) (2017).

<sup>75</sup> LA. REV. STAT. ANN. § 15:560.4(A) (2017).

<sup>76</sup> LA. REV. STAT. ANN. § 15:560.3(A)(4) (2017).

<sup>77</sup> LA. REV. STAT. ANN. § 15:560.3(A)(12) (2017).

thinks is appropriate.<sup>78</sup> Lying to your parole officer or not answering on time could be considered a violation.<sup>79</sup> You are prohibited from owning or controlling any firearms or other dangerous weapons.<sup>80</sup> You must also behave honorably, work carefully and enthusiastically at a legal occupation, and support your “dependents”, if any, to the best of your ability.<sup>81</sup>

Your use of the Internet will also be observed, either in-person or through “remote monitoring.”<sup>82</sup> This includes observation of your incoming and outgoing e-mail, as well as any other electronic communications. The websites you visit will also be observed, and you will be subject to unannounced inspections of your computer and other devices. These devices may be removed from your home for closer inspection.<sup>83</sup>

## E. CONCLUSION

If you are in prison because of a sex offense, there are unique issues that you should be aware of. Information about protective custody, rehabilitation programs, and registration requirements is explained above. We urge you to get a good understanding of this information.

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<sup>78</sup> LA. REV. STAT. ANN. § 15:560.3(A)(10) (2017).

<sup>79</sup> LA. REV. STAT. ANN. § 15:560.3(A)(7) (2017); LA. REV. STAT. ANN. § 15:560.3(C) (2017).

<sup>80</sup> LA. REV. STAT. ANN. § 15:560.3(A)(9) (2017).

<sup>81</sup> LA. REV. STAT. ANN. § 15:560.3(A)(6) (2017).

<sup>82</sup> LA. REV. STAT. ANN. § 15:560.3(A)(13) (2017).

<sup>83</sup> LA. REV. STAT. ANN. § 15:560.3(A)(13)(c) (2017).

## CHAPTER 18: RIGHTS OF INCARCERATED PARENTS

### A. INTRODUCTION

Federal laws regulate the rights of incarcerated parents whose children are in the child welfare system. In 1997, Congress passed the Adoption and Safe Families Act (“ASFA”)<sup>1</sup>, a law making it much harder for incarcerated parents to keep their parental rights.<sup>2</sup> States have passed laws applying ASFA in different ways. This Chapter describes the custody and parental rights of incarcerated parents under Louisiana State law. It is important for you to also read Chapter 33 of the main JLM for information about your rights as an incarcerated parent under federal law.

Part B of this Chapter explains how you can defend against the involuntary placement of your child in foster care. Part C discusses the involuntary termination of your parental rights, a process that allows another person to adopt your child when he is in foster care. Part C also lists the steps you should take while your child is in foster care to make sure that your parental rights are not terminated. Appendices A and B of this Chapter provide the contact information for the Office of Community Services (OCS) regional and parish offices. You can contact these offices for more information about foster care and adoption services in Louisiana.

### B. INVOLUNTARY PLACEMENT OF YOUR CHILD IN FOSTER CARE

Louisiana state law defines a “child in need of care” in a number of ways. If the state finds your child to be a victim of abuse or neglect or “without necessary food, clothing, shelter, medical care, or supervision because of the disappearance or prolonged absence of his parent,”<sup>3</sup> your child may be found to be in need of care. Incarceration of a parent may result in a child being found to be a child in need of care.<sup>4</sup> Child in need of care proceedings determine whether your child should be removed from your custody and placed in the foster care system. In these proceedings, the court will appoint a lawyer to represent your child.<sup>5</sup> You also have a right to have a lawyer represent you in these hearings. If you cannot afford a lawyer, the court must appoint one for you.<sup>6</sup>

If your child is found to be a child in need of care, the Department of Children and Family Services (DCFS) may take custody of your child and place him in foster care in one of the following: (1) in the home of a relative or of a foster family, (2) in a child care facility, or (3) in another living arrangement approved by the state.<sup>7</sup> Involuntary placement of your child in foster care can occur before, or as a result of, your incarceration.

This Part describes the process by which your child may be involuntarily placed in foster care. Section 1 describes when your child may be removed from your custody even *before* a court has determined that your child is a child in need of care. Section 2 describes the adjudication hearing, in which the court determines whether your child is a child in need of care. Section 3 discusses the disposition hearing. In this hearing, the court decides who should get custody of your child, for how long,

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<sup>1</sup> ASFA can be found at 42 U.S.C. §§ 670–679c (2012).

<sup>2</sup> See, e.g., The Adoption and Safe Families Act of 1997: Its Impact on Prisoner Mothers and their Children, *available at* [http://www.womenandprison.org/motherhood/view/the\\_adoption\\_and\\_safe\\_families\\_act\\_of\\_1997\\_its\\_impact\\_on\\_prisoner\\_mothers\\_a](http://www.womenandprison.org/motherhood/view/the_adoption_and_safe_families_act_of_1997_its_impact_on_prisoner_mothers_a) (last visited Feb. 25, 2014).

<sup>3</sup> LA. CHILD. CODE ANN. art. 606. See, e.g., State In Interest of Quan v. Quan, 504 So. 2d 599, 600–601 (La. App. 4 Cir. 1987) *writ granted, judgment amended*, 508 So. 2d 576 (La. 1987) *judgment clarified*, 508 So. 2d 576 (La. 1987) (finding child who suffered from noncongenital rickets, caused by malnutrition or lack of sunshine, to be a child in need of care because development of the disease was due to neglect); State *ex rel.* S.D. v. D.M.D.B., 36,406, p. 14 (La. App. 2 Cir. 8/14/02); 823 So. 2d 1113, 1121 (finding children in need of care where mother had a history of leaving her children unsupervised for anywhere between forty-five minutes and three and a half hours at a time).

<sup>4</sup> See, e.g., State *ex rel.* A.U.M., 46,082, pp. 5–6 (La. App. 2 Cir. 2/16/11); 62 So. 3d 185, 189 (finding a child in need of care where child’s only parent was convicted of murder and incarcerated for ten years).

<sup>5</sup> LA. CHILD. CODE ANN. art. 607(A) (2017).

<sup>6</sup> LA. CHILD. CODE ANN. art. 608(A)(4) (2017).

<sup>7</sup> LA. CHILD. CODE ANN. art. 603(14) (2017).

and with what responsibilities after your child is determined to be a child in need of care. Section 4 describes the case plan, which is used to determine the placement of your child pending permanent placement. Finally, Section 5 discusses the permanency hearing, where the court determines the permanent placement of your child.

### 1. **Instant Order and Continued Custody Hearings**

Before a court has determined that your child is a child in need of care, DCFS may believe that emergency removal of your child from your custody is necessary for your child's protection.<sup>8</sup> DCFS may then seek an instant order of custody from the court.<sup>9</sup> An instant order demands that your child be removed immediately from your custody and placed in the temporary custody of a suitable relative,<sup>10</sup> a suitable individual who can protect the health and safety of your child, or the state, in that order of priority.<sup>11</sup>

When determining whether to grant an instant order, the court must determine whether DCFS took reasonable efforts to prevent or eliminate the need to remove your child from your custody.<sup>12</sup> Reasonable efforts are defined as "the exercise of ordinary diligence and care by department caseworkers and supervisors."<sup>13</sup> However, the court may still order removal of your child even if DCFS's efforts were not reasonable.<sup>14</sup>

A peace officer or probation officer may remove your child from your custody even without a court (instant) order if the officer has reasonable grounds to believe that your child is endangered in his current surroundings and that emergency removal is necessary.<sup>15</sup> The officer then must promptly release your child to the DCFS.<sup>16</sup> DCFS must get an instant order from the court before taking your child into custody.<sup>17</sup>

If your child is removed from your custody under an instant order, the court must hold a continued custody hearing within three days.<sup>18</sup> At this hearing, the state must prove that its continued custody of your child is necessary to ensure your child's health and safety.<sup>19</sup> As with the instant order, the court again must determine whether DCFS took reasonable efforts to prevent or eliminate the need to remove your child from your custody but may still order removal of your child even if DCFS's efforts were not reasonable.<sup>20</sup> If the state maintains custody of your child after the continued custody hearing, you must:

- 1) Cooperate in preparing a case plan to ensure that the needs of your child are met.
- 2) Assist with your child's adjustment to other caretakers if your child cannot return home safely.
- 3) Contribute to the costs of raising your child.

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<sup>8</sup> LA. CHILD. CODE ANN. art. 619 (2017).

<sup>9</sup> LA. CHILD. CODE ANN. art. 619(A) (2017).

<sup>10</sup> The juvenile court must determine that the relative is, in fact, suitable. *See, e.g., State ex rel. D.B. v. M.O.*, 2003-1408, p. 3 (La. App. 3 Cir. 4/14/04); 870 So. 2d 1143, 1144 (noting that the child's maternal grandparents were not suitable relatives because of past and pending criminal charges against the maternal grandfather); *State ex rel. T.M.*, 2003-929, pp. 14-18 (La. App. 3 Cir. 3/24/04); 869 So. 2d 339, 348-350 (placing the child with his foster parents, who were the aunt and uncle of his half-siblings, rather than with his maternal grandparents, where (1) child's maternal grandmother had expressed feelings of anger and hostility towards the child's father and foster parents in the child's presence, (2) OCS's goal was to keep the child together with his half-siblings, who were also in the care of his aunt and uncle, and (3) the child stated that he loved his foster parents and considered them his aunt and uncle).

<sup>11</sup> LA. CHILD. CODE ANN. arts. 619(C)(2), 622(B) (2017).

<sup>12</sup> LA. CHILD. CODE ANN. art. 619(B) (2017).

<sup>13</sup> LA. CHILD. CODE ANN. art. 603(25) (2017).

<sup>14</sup> LA. CHILD. CODE ANN. art. 619(B) (2017).

<sup>15</sup> LA. CHILD. CODE ANN. art. 621(A) (2017).

<sup>16</sup> LA. CHILD. CODE ANN. art. 621(A) (2017).

<sup>17</sup> LA. CHILD. CODE ANN. art. 621(B) (2017).

<sup>18</sup> LA. CHILD. CODE ANN. art. 624(A) (2017).

<sup>19</sup> LA. CHILD. CODE ANN. art. 624(D) (2017).

<sup>20</sup> LA. CHILD. CODE ANN. arts. 626(B)-(D) (2017).

- 4) Keep DCFS informed at all times of your most recent contact information.<sup>21</sup>

This last obligation is very important because custody hearings may be held in your absence if the state cannot determine where you are.<sup>22</sup>

## 2. Adjudication Hearing

DCFS will only seek an instant order if it believes that emergency removal of your child from your custody is necessary for your child's protection. Otherwise, child in need of care proceedings may be brought while your child is still in your custody. To start child in need of care proceedings, the district attorney or DCFS must petition the court.<sup>23</sup>

You can accept or deny the allegations, or claims of legal wrongdoing, in the petition. If you deny the allegations, the court will set up an adjudication hearing to determine whether your child is in need of care.<sup>24</sup> If you still have custody of your child, the adjudication hearing must begin within 105 days of the filing of the petition.<sup>25</sup> If your child is already in continued custody of the state, the hearing must begin within forty-five days of the filing of the petition.<sup>26</sup>

At the adjudication hearing, you can present evidence, call and ask questions of witnesses, and testify on your own behalf.<sup>27</sup> It is the state's responsibility to prove the allegations in the petition.<sup>28</sup> After the adjudication hearing, the court must immediately decide whether your child is in need of care.<sup>29</sup> In "exceptional circumstances," the court may consider this matter for up to ten days.<sup>30</sup>

If your child is already in continued custody of the state, you can tell the court that you agree that your child is in need of care without either accepting or denying the allegations in the petition.<sup>31</sup> Agreeing that your child is in need of care does not mean that you agree to give up your parental rights permanently. It only means that you agree that you are unable to provide your child with the care you think he needs for the time being.

If you agree that your child is in need of care, the state will take legal custody of your child and will make sure that your child is living in a safe and healthy environment until you are able to properly care for your child. If you fulfill your foster care obligations and if you are released within a relatively short time, you will have a good chance of getting your child back. This is because the priority of the state is generally to return your child to your legal custody.<sup>32</sup> However, if you are going to be in prison for more than twelve months, then agreeing that your child is in need of care may create a risk that the state will involuntarily terminate your parental rights. You should seriously consider your decision to place your child in foster care because the DCFS is *required* to petition for termination of your parental rights if your child has been in state custody for seventeen of the last twenty-two months, unless the case plan for your child offers a compelling reason why such termination is not in your child's best interests.<sup>33</sup>

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<sup>21</sup> LA. CHILD. CODE. ANN. art. 682(B), 684(E) (2017).

<sup>22</sup> LA. CHILD. CODE. ANN. art. 625(B)(3) (2017).

<sup>23</sup> LA. CHILD. CODE. ANN. art. 631(A) (2017).

<sup>24</sup> LA. CHILD. CODE. ANN. art. 649(A)(1) (2017).

<sup>25</sup> LA. CHILD. CODE. ANN. art. 659(A) (2017).

<sup>26</sup> LA. CHILD. CODE. ANN. art. 659(A) (2017).

<sup>27</sup> LA. CHILD. CODE. ANN. art. 662 (2017).

<sup>28</sup> LA. CHILD. CODE. ANN. art. 665 (2017).

<sup>29</sup> LA. CHILD. CODE. ANN. art. 666(A) (2017).

<sup>30</sup> LA. CHILD. CODE. ANN. art. 666(A) (2017).

<sup>31</sup> LA. CHILD. CODE. ANN. art. 647 (2017).

<sup>32</sup> LA. CHILD. CODE. ANN. art. 702(C)(1) (2017). *See* State *ex rel.* S.R., 2000-1927, p. 4 (La. App. 4 Cir. 4/11/01); 788 So. 2d 503, 506 ("The first priority in permanently placing a child is the return of the child to the legal custody of the parents within a specified time period consistent with the child's age and need for a safe and permanent home.")

<sup>33</sup> LA. CHILD. CODE. ANN. art. 1004.1 (2017). Note that the seventeen months do not have to be consecutive. *See, e.g.,* State *ex rel.* V.F.R., 2001-1041, pp. 5-6 (La. App. 3 Cir. 2/13/02); 815 So. 2d 1035, 1038, *writ denied*, 2002-0797 (La. 4/12/02); 813 So. 2d 412 (finding that the state was required to file a petition to terminate parental rights where the child was in state custody from June 1999 to September 2000 and again from January 2001 to March 2001).

### 3. Disposition Hearing

If the court decides that your child is in need of care, it must order a disposition hearing within thirty days.<sup>34</sup> At the disposition hearing, the court decides who should get custody of your child, for how long, and what responsibilities that person or agency has.<sup>35</sup> The court may decide to return your child to you under certain terms and conditions, to place your child in the custody of a relative or other suitable individual, or to place your child in foster care.<sup>36</sup> The court's main consideration when making its decision must be your child's health and safety.<sup>37</sup>

The court cannot remove your child from your custody unless it determines that removal is necessary to protect your child's welfare.<sup>38</sup> The court must determine that DCFS has made reasonable efforts to prevent or eliminate the need for your child to be removed from your custody.<sup>39</sup> If your child is already in continued custody of the state, the court must determine that DCFS has made reasonable efforts to reunify you with your child or to finalize the placement of your child in a safe, permanent home.<sup>40</sup>

If the court does remove your child from your custody, it must place your child in the custody of a relative unless doing so would not be in the best interests of your child.<sup>41</sup> The court also must inform you about the following:

- 1) Case review and permanency review procedures. Section 4 of this Part, below, explains these procedures;
- 2) Your obligations to cooperate with DCFS and to follow the requirements of the case plan;
- 3) The possibility that you may lose your parental rights if you do not follow the requirements of the case plan;
- 4) Your obligation to keep DCFS informed about your most recent contact information;
- 5) Your obligations to contribute to the cost of care and treatment for your child.<sup>42</sup>

### 4. Case Plans and Case Review Procedure

If the court places your child in the custody of a foster care agency, the agency must develop a case plan for your child.<sup>43</sup> The case plan describes the placement of your child until the agency can get permanent placement. The case plan should be designed to achieve placement for your child in the "least restrictive, most family-like, and most appropriate setting available"<sup>44</sup> and must be completed within sixty days after the agency gets custody of your child.<sup>45</sup>

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<sup>34</sup> LA. CHILD. CODE ANN. art. 678(A), (B) (2017).

<sup>35</sup> LA. CHILD. CODE ANN. art. 684(A)(1)–(3) (2017).

<sup>36</sup> LA. CHILD. CODE ANN. art. 681(A)(1)–(5) (2017).

<sup>37</sup> LA. CHILD. CODE ANN. art. 682(A) (2017).

<sup>38</sup> LA. CHILD. CODE ANN. art. 682(A) (2017).

<sup>39</sup> LA. CHILD. CODE ANN. art. 682(A) (2017).

<sup>40</sup> LA. CHILD. CODE ANN. art. 682(A) (2017); *see also* State *ex rel.* B.M.J.-C. v. K.J., 45,515, p. 9 (La. App. 2 Cir. 6/23/10); 42 So. 3d 1052, 1057–1058 (finding that the Department of Social Services made reasonable efforts to assist mother in removing impediments to her reunification with her children when it, *inter alia*, provided her with a detailed day-by-day case plan to improve her daily living skills, referred her to a training program that teaches daily living skills, and required her to submit to regular substance abuse and mental health assessments).

<sup>41</sup> LA. CHILD. CODE ANN. art. 683(B) (2017); *see, e.g.*, State *ex rel.* A.L., 2009-1085, pp. 4–5 (La. App. 1 Cir. 10/27/09); 29 So. 3d 618, 620–621 (finding that it would not be in child's best interest to be placed with maternal grandmother where maternal grandmother had been investigated several times by OCS for her own parenting abilities and for mental and emotional instability).

<sup>42</sup> LA. CHILD. CODE ANN. art. 682(B) (2017).

<sup>43</sup> LA. CHILD. CODE ANN. art. 673 (2017).

<sup>44</sup> LA. CHILD. CODE ANN. art. 675(A) (2017).

<sup>45</sup> LA. CHILD. CODE ANN. art. 673 (2017).



You should cooperate with the DCFS in creating the case plan for your child. You also should follow the requirements in the case plan. You may lose your parental rights to your child if you fail to follow the case plan requirements and make significant progress toward achieving its goals.<sup>46</sup>

The court must review the case plan regularly at case review hearings. At each case review hearing, the court may either approve the case plan or order DCFS to update the case plan as necessary.<sup>47</sup> If your child was already in continued custody before the disposition hearing, the first case review hearing must be held three months after the disposition hearing.<sup>48</sup> Otherwise, the first case review hearing must be held no more than six months after the disposition hearing.<sup>49</sup> The following case review hearings must be held at least once every six months until your child has been permanently placed.<sup>50</sup>

## 5. Permanency Hearing

At a permanency hearing, the court determines the permanent placement plan for your child. Permanent placement can include: (1) return of custody of your child to you, (2) adoption, or (3) placement of your child with a legal guardian.<sup>51</sup> The court must hold a permanency hearing within twelve months of your child's disposition hearing, or within nine months of the disposition hearing if your child had already been removed from your custody before the disposition hearing.<sup>52</sup>

Generally, the priority of the state is to return your child to your legal custody.<sup>53</sup> However, in order for reunion to remain the permanent plan for your child, you must be following your child's case plan and making significant progress towards achieving its goals.<sup>54</sup> In order to show progress towards achieving the goals of your child's case plan, you must show a "significant, substantial indication of reformation . . . such as . . . [changing] in a significant way the behavior which served as a basis for the state's removal of a child from the home."<sup>55</sup> The following may show that there is not a reasonable expectation of significant improvement of your conduct in the near future: physical or mental illness, substance abuse, a pattern of repeated incarceration, or other behavior that reasonably suggests that you are unwilling or unable to provide an acceptable permanent home for your child.<sup>56</sup> Note that even though you must show significant progress, you do not need to have corrected all of the problems that previously existed.<sup>57</sup>

As discussed in Part B(3) of this Chapter, DCFS must make reasonable efforts to reunite you and your child.<sup>58</sup> However, DCFS does not have to reunite you with your child if any of the following have happened:

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<sup>46</sup> LA. CHILD. CODE ANN. art. 702(G) (2017). Part C of this Chapter discusses termination of parental rights.

<sup>47</sup> LA. CHILD. CODE ANN. art. 700(A) (2017).

<sup>48</sup> LA. CHILD. CODE ANN. art. 692(A) (2017).

<sup>49</sup> LA. CHILD. CODE ANN. art. 692(A) (2017).

<sup>50</sup> LA. CHILD. CODE ANN. art. 692(B) (2017).

<sup>51</sup> LA. CHILD. CODE ANN. art. 603(22) (2017). *See, e.g., State ex rel. C.N. v. Harte*, 42,977, p. 3 (La. App. 2 Cir. 1/9/08); 974 So. 2d 143, 145 (affirming grant of guardianship to child's relative, where child "was thriving at [the relative's house], benefitted from being near his brother . . . , and was close to his grandfather and cousins").

<sup>52</sup> LA. CHILD. CODE ANN. art. 702(B) (2017).

<sup>53</sup> LA. CHILD. CODE ANN. art. 702(C)(1), (D) (2017). *See State ex rel. S.R.*, 2000-1927, p. 4 (La. App. 4 Cir. 4/11/01); 788 So. 2d 503, 506 ("The first priority in permanently placing a child is the return of the child to the legal custody of the parents within a specified time period consistent with the child's age and need for a safe and permanent home.").

<sup>54</sup> LA. CHILD. CODE ANN. art. 702(C)(1) (2017).

<sup>55</sup> *State ex rel. S.R.*, 2000-1927, pp. 5-6 (La. App. 4 Cir. 4/11/01); 788 So. 2d 503, 506 (significant progress of mother in achieving goals of case plan not established where updated psychiatric and psychological reports were not provided, and where the only evidence of a modification in mother's abusive behavior was the case worker's testimony that she talked to the parent about the proper way to discipline children).

<sup>56</sup> LA. CHILD. CODE ANN. art. 1036(D) (2017).

<sup>57</sup> *State ex rel. S.R.*, 2000-1927, p. 4 (La. App. 4 Cir. 4/11/01); 788 So. 2d 503, 506 ("A reasonable expectation of reformation exists when a parent has cooperated with state officials and has shown improvement, although all of the problems that exist have not been eliminated.").

<sup>58</sup> LA. CHILD. CODE ANN. art. 682(A) (2017).

- 1) The parent has displayed extremely shocking conduct, including but not limited to any of the grounds for certification for adoption under Article 1015.
- 2) The parent has committed murder or manslaughter of another child or has helped, planned, or asked someone else to commit this type of murder or manslaughter.
- 3) The parent has committed a felony that results in serious bodily injury to the child or another child of the parent.
- 4) The state has already removed parental rights for another child.<sup>59</sup>

At any time during the process, DCFS can ask the court to decide that reunion efforts are not required.<sup>60</sup> If the court makes this decision, a permanency hearing must be held within 30 days.<sup>61</sup>

### C. INVOLUNTARY TERMINATION OF YOUR PARENTAL RIGHTS

A court may terminate, or end, parental rights where parents are unwilling or unable to provide acceptable safety and care for their children.<sup>62</sup> This Part describes the process that must be followed before your parental rights may be terminated. Section 1 describes the reasons for termination of parental rights. Section 2 discusses the petition, or paperwork, that begins termination of parental rights proceedings and the hearing in which you answer that petition. Section 3 describes the termination of parental rights hearing, where the court decides whether or not to terminate your parental rights. Section 4 explains the judgments that the court may reach in the termination of parental rights hearing and the consequences of those judgments. Section 5 describes ways in which you may recover your parental rights after they have been terminated.

In termination proceedings, the court will appoint a lawyer to represent your child.<sup>63</sup> You also have a right to have a lawyer represent you in these hearings.<sup>64</sup> If you cannot afford a lawyer, the court must appoint one for you.<sup>65</sup> The process of deciding termination of parental rights moves quickly because a speedy conclusion is important for the stability of your child. It is important that you follow these procedures closely, attend all hearings, and meet all deadlines that the court sets.

#### 1. Grounds for Termination of Parental Rights

Article 1015 of the Louisiana Children's Code lists the grounds for termination of parental rights.<sup>66</sup> This Section discusses several of these grounds in detail. In order to terminate parental rights, only one of these grounds needs to be proven by clear and convincing evidence.<sup>67</sup> The court must also find that termination of parental rights is in the best interests of the child.<sup>68</sup> Although the courts recognize

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<sup>59</sup> LA. CHILD. CODE ANN. art. 672.1(C) (2017). Part C(1) of this Chapter discusses some of the grounds for certification of adoption pursuant to Article 1015.

<sup>60</sup> LA. CHILD. CODE ANN. art. 672.1(A) (2017).

<sup>61</sup> LA. CHILD. CODE ANN. art. 672.1(D) (2017).

<sup>62</sup> LA. CHILD. CODE ANN. art. 1001 (2017).

<sup>63</sup> LA. CHILD. CODE ANN. art. 1016(B) (2017).

<sup>64</sup> LA. CHILD. CODE ANN. art. 1016(A) (2017).

<sup>65</sup> LA. CHILD. CODE ANN. art. 1016(C) (2017).

<sup>66</sup> LA. CHILD. CODE ANN. art. 1015 (2017).

<sup>67</sup> LA. CHILD. CODE ANN. art. 1015, 1035(A) (2017); *see also, e.g., State ex rel. J.A.*, 99-2905, p. 9 (La. 1/12/00); 752 So. 2d 806, 811 (DSS sought termination of parental rights solely under LA. CHILD. CODE ANN. art. 1015(5), which allows involuntary termination of parental rights when at least one year has passed since the child was removed from his parent's custody and the parent neither has complied with the child's case plan nor has a reasonable expectation of future improvement); *State ex rel. J.T.C.*, 04-1096, p. 12 (La. App. 5 Cir. 2/15/05); 895 So. 2d 607, 615-616, *writ denied*, 2005-0466 (La. 4/8/05); 899 So. 2d 11 (granting termination of parental rights under LA. CHILD. CODE ANN. art. 1015(4) because the father failed to maintain significant contact with, and failed to provide significant contributions for, his children for six consecutive months after the petition was filed).

<sup>68</sup> LA. CHILD. CODE ANN. art. 1039 (2017); *see also, e.g., State ex rel. J.A.*, 99-2905, p. 9 (La. 1/12/00); 752 So. 2d 806, 811 ("The State need establish only one ground [of LA. CHILD. CODE ANN. art. 1015] . . . , but the judge must also find that the termination is in the best interest of the child."); *State ex rel. B.H. v. A.H.*, 42,864, p. 6 (La. App. 2 Cir. 10/24/07), 968 So. 2d 881, 885 ("Once a ground for termination has been established, the judge may terminate parental rights if the termination is in the best interest of the child."); *State ex rel. J.T.C.*, 04-1096, p. 12 (La. App. 5 Cir.

that termination of your parental rights may be serious, they have decided that the child's best interest is the most important consideration.<sup>69</sup>

a. Article 1015(5)—Intention to Permanently Avoid Parental Responsibility

Under Article 1015(5), your parental rights may be terminated if you “demonstrat[e] an intention to permanently avoid parental responsibility” by (1) failing to provide significant contributions to your child's care and support, or (2) failing to maintain significant contact with your child for any six months prior to the filing of the petition to terminate your parental rights.<sup>70</sup> For example, in one case, the court terminated an incarcerated father's parental rights where the father admitted that he provided no support for his children, had failed to provide significant contributions to his children's care and support for over one year, and had not provided any financial support for his children for more than six consecutive months.<sup>71</sup>

Note that “the conviction and sentencing of a parent for a significant period of time could demonstrate ‘an intention to permanently avoid parental responsibility’” under Article 1015(5) when grouped “with a failure to pay support or a failure to maintain contact with the child for a period of six months.”<sup>72</sup> Incarceration is not a recognized defense for the failure to support your child or to maintain contact with your child if the incarceration is shown to be a result of your actions.<sup>73</sup>

The court also may consider the amount of *effort* you put into staying in contact with your child when deciding whether Article 1015(5) grounds have been met. For example, one court noted that an incarcerated father “failed to [actively] . . . pursue or discover his rights” after being notified that his children were placed in foster care.<sup>74</sup> The court went on to decide that “the father failed to provide support and/or that he abandoned the children under [Louisiana Children's Code] art. 1015(4)(b) and (c).”<sup>75</sup>

b. Article 1015(6)—Child Removed and No Improvement in Your Condition

Under Article 1015(6), your parental rights may be terminated if (1) your child was removed from your custody at least one year ago because of a court order, (2) you have not significantly followed your child's case plan, and (3) there is no reasonable expectation that your condition or conduct will improve significantly in the near future.<sup>76</sup> This last requirement can be met just by evidence that you have been in prison several times and cannot care for the child for an extended period of time.<sup>77</sup>

c. Article 1015(7)—Foster Care While Incarcerated and Without Plan for Care

Under Article 1015(7), your parental rights may be terminated if (1) your child is in foster care, (2) you have been convicted and your sentence will be long enough that you will not be able to care for

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2/15/05); 895 So. 2d 607, 615, *writ denied*, 2005-0466 (La. 4/8/05); 899 So. 2d 11 (“The State need establish only one ground under [Louisiana Children's Code] art. 1015 upon which to base the termination of parental rights . . . . In addition, the trial judge must also find that the termination is in the best interest of the child.”).

<sup>69</sup> State *ex rel.* J.T.C., 04-1096, p. 11 (La. App. 5 Cir. 2/15/05); 895 So. 2d 607, 614, *writ denied*, 2005-0466 (La. 4/8/05); 899 So. 2d 11.

<sup>70</sup> LA. CHILD. CODE ANN. art. 1015(5)(b), (c) (2017).

<sup>71</sup> State *ex rel.* C.M.O., 2004-1780, p. 3 (La. App. 4 Cir. 4/13/05); 901 So. 2d 1168, 1170–1171.

<sup>72</sup> LA. CHILD. CODE ANN. art. 1015 (2017) (2003 comment).

<sup>73</sup> See State *ex rel.* A.T.C., 06-562, p. 5 (La. App. 5 Cir. 11/28/06), 947 So. 2d 71, 75 (upholding termination of parental rights where mother failed to support minor children for over six months and sporadic contact was only after petition for termination was filed).

<sup>74</sup> State *ex rel.* J.T.C., 04-1096, p. 12 (La. App. 5 Cir. 2/15/05); 895 So. 2d 607, 616, *writ denied*, 2005-0466 (La. 4/8/05); 899 So. 2d 11 (emphasis in original).

<sup>75</sup> State *ex rel.* J.T.C., 04-1096, p. 12 (La. App. 5 Cir. 2/15/05); 895 So. 2d 607, 616, *writ denied*, 2005-0466 (La. 4/8/05); 899 So. 2d 11.

<sup>76</sup> LA. CHILD. CODE ANN. art. 1015(6) (2017).

<sup>77</sup> LA. CHILD. CODE ANN. art. 1036(D)(2) (2017).

your child for an extended period of time, and (3) you have not provided a reasonable plan of care for your child other than foster care.<sup>78</sup>

Louisiana courts have not clearly explained how long an “extended period of time” is. Article 1036(E) of the Louisiana Children’s Code says that a five-year sentence is an “extended period of time.” But, the Code says that your parental rights will not be taken away just because you are in prison.<sup>79</sup> One Louisiana court has said in a case that one year is not an “extended period of time.”<sup>80</sup> In that case, the father regularly kept in touch with the Department of Social Services about keeping in contact with his son, the father wrote many letters to his son while in prison, the son expressed a desire to see his father, and the father was to be reviewed for possible release within a year.<sup>81</sup> The court held that termination of the father’s parental rights was not in the best interest of the child, even though the father was in prison.<sup>82</sup> Therefore, you should keep as much contact as you can with your child while you are in prison.

Courts also look at your child’s age and need for a “safe, stable, and permanent home” when deciding what an “extended period of time” is in your case.<sup>83</sup> Also, if your conviction has been overturned and you will have a new trial, the court cannot end your parental rights because you will be unable to care for your child for “an extended period of time.”<sup>84</sup>

Within thirty days after your child is placed in foster care, a representative of the DCFS must visit you. DCFS must give you written notice that you must give a reasonable plan for the care of your child.<sup>85</sup> At that time, you must give DCFS the contact information of every possible person who can take care of your child.<sup>86</sup> Then, within sixty days after DCFS gave you notice, you must give DCFS your proposed plan of care for your child.<sup>87</sup> During this sixty day period before the plan is due, you may send DCFS additional information or names of other possible caregivers using the form attached to the notice.<sup>88</sup> Your plan of care does not need to be the best plan possible, as long as the plan is a reasonable alternative to foster care.<sup>89</sup> Even if you list close relatives that your children could live with while you are in prison, the court still may find that your plan is unreasonable. For example, the court in one case found the incarcerated father’s proposed plan that his children live with his wife was unreasonable. The father had an eighteen-year sentence, his wife did not know the children, and the children were already living with foster parents who had bonded with the children and wanted to adopt them.<sup>90</sup> In another case, the incarcerated father proposed that his children live with his aunt. The aunt said she would not care for the children at that time and had already returned the children once to the Department of Social Services.<sup>91</sup>

<sup>78</sup> LA. CHILD. CODE ANN. art. 1015(7) (2017); *see also* State *ex rel.* R.C. v. Everett, 34,986, p. 6 (La. App. 2 Cir. 5/9/01); 787 So. 2d 530, 534–535 (finding unreasonable the incarcerated father’s proposed plan that his children live with his wife, where the father was serving an eighteen-year sentence, his wife was a stranger to the children, and the children were already living with foster parents who had significantly bonded with and expressed a desire to adopt the children); In Interest of Gogreve, 556 So. 2d 967, 969 (La. App. 3 Cir. 1990) (upholding termination of incarcerated mother’s parental rights because her proposed plan to place her child with certain relatives was unreasonable, where relatives had twice received negative recommendations from DSS, were not blood relatives, lacked the financial capacity to care for the child, and failed to remain in contact with the child while the child was in foster care).

<sup>79</sup> LA. CHILD. CODE ANN. art. 1036(E) (2017) (emphasis added).

<sup>80</sup> C.D. v. L.C., 01-0663, p. 3 (La. App. 3 Cir. 10/3/01); 796 So. 2d 844, 846, *writ denied*, 2001-2986 (La. 11/20/01); 801 So. 2d 1079.

<sup>81</sup> C.D. v. L.C., 2001-0663, p. 7 (La. App. 3 Cir. 10/3/01); 796 So. 2d 844, 848–849, *writ denied*, 2001-2986 (La. 11/20/01); 801 So. 2d 1079.

<sup>82</sup> C.D. v. L.C., 2001-0663, p. 9 (La. App. 3 Cir. 10/3/01); 796 So. 2d 844, 850, *writ denied*, 2001-2986 (La. 11/20/01); 801 So. 2d 1079.

<sup>83</sup> LA. CHILD. CODE ANN. art. 1015(7) (2017).

<sup>84</sup> State *ex rel.* J.T.C., 04-1096, p. 12 (La. App. 5 Cir. 2/15/05); 895 So. 2d 607, 615–616, *writ denied*, 2005-0466 (La. 4/8/05); 899 So. 2d 11.

<sup>85</sup> LA. CHILD. CODE ANN. art. 1036.2(B) (2017).

<sup>86</sup> LA. CHILD. CODE ANN. art. 1036.2(B) (2017).

<sup>87</sup> LA. CHILD. CODE ANN. art. 1036.2(C) (2017).

<sup>88</sup> LA. CHILD. CODE ANN. art. 1036.2(C) (2017).

<sup>89</sup> State *ex rel.* R.C. v. Everett, 34,986, p. 4 (La. App. 2 Cir. 5/9/01); 787 So. 2d 530, 534; State *ex rel.* M.J.G., 01-1271, p. 4 (La. App. 3 Cir. 2/6/02); 815 So. 2d 955, 958.

<sup>90</sup> State *ex rel.* R.C. v. Everett, 34,986, p. 5 (La. App. 2 Cir. 5/9/01); 787 So. 2d 530, 534–535.

<sup>91</sup> State *ex rel.* M.J.G., 2001-1271, p. 5 (La. App. 3 Cir. 2/6/02); 815 So. 2d 955, 958.

The court found that the plan was unreasonable. These cases show that just because you are related to someone does not mean they are a reasonable alternative to foster care. Instead, the court looks at the relative's relationship with your children, whether the relative is willing and able to take care of your children, and where your children are placed currently.

d. Other Grounds for Termination

While the above three grounds are common grounds for termination of parental rights, there are other ways that your parental rights can be terminated. For the complete list of the grounds of termination, *see* LA. CHILD. CODE ANN. art. 1015 (2017). Most of the other grounds involve convictions for certain serious crimes. Again, to terminate your parental rights, the court only needs to find one ground for termination under Article 1015 and that termination is in the best interest of your child.

2. Petition for Termination of Parental Rights

A petition for termination of parental rights is a formal way of asking the court to end your rights as a parent under Article 1015 (discussed above in Part C(1)). A petition must be filed to start termination proceedings.<sup>92</sup> You should be served with notice and a copy of the petition.<sup>93</sup> The notice should state the date of your termination hearing.<sup>94</sup>

A few different parties may petition for termination of your parental rights. The district attorney may petition for termination of your parental rights on any of the grounds listed in Article 1015 of the Louisiana Children's Code, including those discussed above in Part C(1) of this Chapter.<sup>95</sup> DCFS may petition for termination of your parental rights if termination is authorized under Article 1015(5), (6), or (7).<sup>96</sup> Also, DCFS is *required* to petition for termination of your parental rights if your child has been in state custody for seventeen of the last twenty-two months. The only exception is if the case plan for your child offers a compelling (or particularly good) reason why termination is not in your child's best interests.<sup>97</sup> Moreover, the lawyer appointed for your child may petition for termination of parental rights if the petition states a ground of termination under Article 1015(5), (6), or (7) and the district attorney or DCFS has not filed a petition within eighteen months after your child was found to be in need of care.<sup>98</sup> Foster parents who want to adopt your child may also petition for the termination of your parental rights if adoption is the permanent plan for your child, your child has been in state custody under the foster parent's care for seventeen of the last twenty-two months, and DCFS has not petitioned for termination of your parental rights.<sup>99</sup> Finally, the court may order the filing of a petition for termination of parental rights on its own.<sup>100</sup>

You must attend a hearing to answer the petition to terminate your parental rights.<sup>101</sup> You answer the petition by accepting or by denying the facts stated in it. If you deny any of the facts in the petition, you will be given a date to return for a termination of parental rights hearing.<sup>102</sup>

The hearing to answer the petition must take place at least five days after you get the petition and no more than fifteen days after the petition is filed.<sup>103</sup> If you do not show up to this hearing, the court will set a date for a termination of parental rights hearing even though you were not at the hearing.<sup>104</sup>

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<sup>92</sup> LA. CHILD. CODE ANN. arts. 1017–1019 (2017).

<sup>93</sup> LA. CHILD. CODE ANN. art. 1020 (2017).

<sup>94</sup> LA. CHILD. CODE ANN. art. 1020 (2017).

<sup>95</sup> LA. CHILD. CODE ANN. art. 1004(C) (2017).

<sup>96</sup> LA. CHILD. CODE ANN. arts. 1004(D)(3), (4), (5) (2017).

<sup>97</sup> LA. CHILD. CODE ANN. art. 1004.1 (2017). Note that the seventeen months do not have to be consecutive. *See, e.g.*, State ex rel. V.F.R., 2001-1041, p. 5 (La. App. 3 Cir. 2/13/02); 815 So. 2d 1035, 1038, *writ denied*, 2002-0797 (La. 4/12/02); 813 So. 2d 412 (finding that the state was required to file a petition to terminate parental rights where the child was in state custody from June 1999 to September 2000 and again from January 2001 to March 2001).

<sup>98</sup> LA. CHILD. CODE ANN. art. 1004(B) (2017).

<sup>99</sup> LA. CHILD. CODE ANN. art. 1004(G) (2017).

<sup>100</sup> LA. CHILD. CODE ANN. art. 1004(A) (2017).

<sup>101</sup> LA. CHILD. CODE ANN. art. 1025.1 (2017).

<sup>102</sup> LA. CHILD. CODE ANN. art. 1020 (2017).

### 3. Termination of Parental Rights Hearing

If you have denied any of the facts in the petition at the hearing to answer the petition, the court will hold a termination of parental rights hearing. At the termination of parental rights hearing, the court decides whether or not to terminate your parental rights. This hearing must be held within sixty days of the hearing to answer the petition.<sup>105</sup> It is very important that you go to the termination of parental rights hearing. If you do not go to this hearing, the hearing will still be held and your parental rights may be terminated without you.<sup>106</sup>

At this hearing, the petitioner must prove each part of a ground for termination of your parental rights by clear and convincing evidence.<sup>107</sup> The clear and convincing evidence standard means that the petitioner must show that each of the conditions of the specific grounds for termination is “highly probable,” or very likely.<sup>108</sup> The clear and convincing evidence standard needs more proof than the preponderance of the evidence standard but is easier to meet than the beyond a reasonable doubt standard.<sup>109</sup> The preponderance of the evidence standard means that it is just barely more likely than not that the fact being proven is true. The beyond a reasonable doubt standard means that there can be no doubt in a reasonable person’s mind that the fact is true. The clear and convincing evidence standard means that the fact must be substantially more likely to be true than not.”<sup>110</sup> In this hearing, you or the petitioner can bring evidence like an earlier court’s decision, your admission that your child needs care, or an instant or court order taking your child out of your custody.<sup>111</sup>

Even if the court thinks the state has proved a ground for termination of parental rights, a court still will not terminate parental rights unless it finds that it is in your child’s best interests to terminate your parental rights.<sup>112</sup> The court must look at how close your child is to his or her current caretakers when the court decides your child’s best interests.<sup>113</sup>

### 4. Termination Judgment

The court must make a decision within thirty days after the termination of parental rights hearing ends.<sup>114</sup> If the court finds that no ground of termination of parental rights has been met, or that termination of parental rights is not in the best interest of your child, it may take any of the following steps:

- 1) Dismiss (or reject) the petition for termination of your parental rights.

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<sup>103</sup> LA. CHILD. CODE ANN. arts. 1021–1022 (2017) (service shall be made not less than five days prior to commencement of the hearing); LA. CHILD. CODE ANN. art. 1025.1 (2017) (parent must appear within fifteen days of the filing of the petition).

<sup>104</sup> LA. CHILD. CODE ANN. art. 1025.3(A) (2017).

<sup>105</sup> LA. CHILD. CODE ANN. art. 1031 (2017).

<sup>106</sup> LA. CHILD. CODE ANN. art. 1033 (2017).

<sup>107</sup> LA. CHILD. CODE ANN. art. 1035(A) (2017).

<sup>108</sup> See, e.g., *State ex rel. T.L.B.*, 2000-1451, p. 4 (La. App. 3 Cir. 4/4/01); 783 So. 2d 626, 629 (determining that there was no reasonable expectation of significant improvement in the parent’s physically and sexually abusive conduct towards his children, where he consistently denied abusive behavior despite overwhelming evidence to the contrary).

<sup>109</sup> *Louisiana State Bar Ass’n v. Edwins*, 329 So. 2d 437, 442 (La. 1976).

<sup>110</sup> *State in Interest of B.K.F.*, 97-572, pp. 9–10 (La. App. 5 Cir. 11/25/97); 704 So. 2d 314, 318, *writ denied*, 97-3173 (La. 2/20/98); 709 So. 2d 779 (affirming that a schizophrenic mother who was unable to independently care for herself was unlikely to be able to independently care for her child in the near future).

<sup>111</sup> LA. CHILD. CODE ANN. art. 1036.1(A) (2017).

<sup>112</sup> See, e.g., *State ex rel. J.M.*, 2002-2089, p. 15 (La. 1/28/03); 837 So. 2d 1247, 1256 (finding that although mother with mild mental retardation loved and was willing to care for her six children, two of whom had special needs, she was incapable of providing such care, and it was therefore in the best interests of the children to terminate her parental rights as to three of the children); see also *C.D. v. L.C.*, 2001-0663, p. 4 (La. App. 3 Cir. 10/3/01), 796 So. 2d 844, 847, *writ denied*, 2001-2986 (La. 11/20/01), 801 So. 2d 1079 (finding termination to not be in best interests of child).

<sup>113</sup> LA. CHILD. CODE ANN. art. 1037(B) (2017); see also, e.g., *State ex rel. R.C. v. Everett*, 34,986, p. 3 (La. App. 2 Cir. 5/9/01); 787 So. 2d 530, 533 (noting that the children had “significantly bonded with their foster parents who expressed a desire to adopt” as a factor supporting the conclusion that termination was in the children’s best interests).

<sup>114</sup> LA. CHILD. CODE ANN. art. 1037(A) (2017).

- 2) Return your child to your full care and custody.
- 3) If another court had found your child to be in need of care, this court may reaffirm that decision.
- 4) Issue a judgment that your child is a child in need of care, if there are enough facts to do so.<sup>115</sup>

But, if the court finds that any ground for termination of parental rights is met, and that termination of parental rights is in the best interests of your child, it *must* issue a judgment ordering termination of your rights.<sup>116</sup> If the judge issues a judgment ordering termination of your rights, custody of your child will go to DCFS, an adult relative who is willing to adopt your child without receiving an adoption subsidy, or another suitable person.<sup>117</sup> If you and your child's other parent have both had your parental rights terminated, the judgment will mean your child can be adopted.<sup>118</sup> Because your parental rights have been terminated, your child may be adopted without your consent.<sup>119</sup> DCFS, and not the court, will determine the placement of your child.<sup>120</sup>

If the court issues a judgment terminating your parental rights, the court may nevertheless order that you be allowed continued contact with your child while his final adoption is processing, if the court determines that contact with you is in your child's best interests. However, such an order may be changed, so your continued contact may be terminated at any time.<sup>121</sup> Also, once your child has been adopted, the order for continued contact no longer remains in effect.<sup>122</sup>

If your parental rights are terminated, you are permitted to use the services of the Louisiana Adoption Voluntary Registry.<sup>123</sup> This registry will allow your child to obtain information about you either through his adoptive parent or, after he turns eighteen, on his own.<sup>124</sup> To add your name to the registry, you must complete a series of registration forms and pay a registration fee of \$25.00. You must contact the registry to receive a registration packet.<sup>125</sup> If both you and your child register with the registry, you will each be required to complete an hour of counseling. The registry then will give your child's counselor your contact information, and the counselor will contact you and your child to give you the information to contact each other.<sup>126</sup>

## 5. Restoring Your Parental Rights

Louisiana is one of only a handful of states with statutes that allow for parental rights to be restored.<sup>127</sup> If your child is in foster care and at least fifteen years old, your child's lawyer or DCFS may

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<sup>115</sup> LA. CHILD. CODE ANN. art. 1039(B) (2017).

<sup>116</sup> LA. CHILD. CODE ANN. art. 1037(B) (2017).

<sup>117</sup> LA. CHILD. CODE ANN. art. 1037(D) (2017).

<sup>118</sup> LA. CHILD. CODE ANN. art. 1037(F) (2017).

<sup>119</sup> LA. CHILD. CODE ANN. art. 1193 (2017).

<sup>120</sup> *State ex rel. C.J.K.*, 2000-2375, p. 12 (La. 11/28/00); 774 So. 2d 107, 117.

<sup>121</sup> LA. CHILD. CODE ANN. art. 1037.1(C) (2017).

<sup>122</sup> LA. CHILD. CODE ANN. art. 1037.1(B) (2017).

<sup>123</sup> LA. CHILD. CODE ANN. art. 1043 (2017).

<sup>124</sup> LA. CHILD. CODE ANN. arts. 1270(B)–(C) (2017); *see also* Adoption Reunion Registry, *available at* <http://www.dss.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=116> (last visited Sept. 17, 2017).

<sup>125</sup> Contact the registry at 1-888-LAHELP-U (1-888-524-3578) or by writing to The Louisiana Adoption Voluntary Registry, Post Office Box 3318, Baton Rouge, LA 70821. *See* Louisiana Department of Children & Family Services, Louisiana Adoption Voluntary Registry: Linking Adopted Persons and Birth Families (2012), *available at* <https://stellent.dcf.la.gov/LADSS/getContent?id=76566&docName=071392&rendition=web&mimeType=application/pdf> (last visited Sept. 16, 2017).

<sup>126</sup> *See* Louisiana Department of Social Services, Office of Community Services, Louisiana Adoption Voluntary Registry: Linking Adopted Persons and Birth Families (2012), *available at* <https://stellent.dcf.la.gov/LADSS/getContent?id=76566&docName=071392&rendition=web&mimeType=application/pdf> (last visited Sept. 16, 2017).

<sup>127</sup> CAL. WELF. & INST. CODE § 366.26(i)(3) (2017); HAW. REV. STAT. § 571–563 (2016); 705 ILL. COMP. STATE. ANN. 405/2-34 (2013); LA. CHILD. CODE ANN. art. 1051 (2008); NEV. REV. STAT. ANN. §§ 128.170–180 (2007); N.Y. SOC. SERV. LAW § 384-b(13) (2015); WASH. REV. CODE § 13.34.215 (2007); *see also* Randi J. O'Donnell, Note, *A Second Chance for Children and Families: A Model Statute to Reinstate Parental Rights after Termination*, 48 FAM. CT. REV. 362, 370 (2010).

file a motion to restore your parental rights or to re-establish your contact with your child.<sup>128</sup> The court might choose to grant such a motion if it believes it is in your child's best interests, for example if your child has been in foster care placements for an extended period of time and you have demonstrated improvement in the conduct that led to your losing your parental rights in the first place.<sup>129</sup> You should receive a copy of the court's motion.<sup>130</sup> The court will hold a hearing between forty-five and sixty days after the motion is filed to decide whether to restore your parental rights.<sup>131</sup> Although you have a right to speak at the hearing, the hearing may be held in your absence.<sup>132</sup> However, your parental rights will not be restored without your consent.<sup>133</sup>

#### D. CONCLUSION

Incarceration can place you at risk of losing custody of your child or even of losing your parental rights. The court cannot remove your child from your custody unless removal is necessary to protect your child's welfare. Similarly, the court cannot terminate your parental rights unless doing so is in the best interests of your child. Therefore, if you want to maintain your relationship with your child, it is important that you maintain contact with your child, your caseworker, and your child's temporary custodian; contribute to the costs of raising your child; and cooperate with creating and fulfilling your child's case plan. Such cooperation can provide evidence in your favor that the court may consider when making its decisions.

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<sup>128</sup> LA. CHILD. CODE ANN. art. 1051(A) (2017).

<sup>129</sup> See, e.g., Randi J. O'Donnell, Note, *A Second Chance for Children and Families: A Model Statute to Reinstate Parental Rights after Termination*, 48 FAM. CT. REV. 362, 370 (2010).

<sup>130</sup> LA. CHILD. CODE ANN. art. 1051(C) (2017).

<sup>131</sup> LA. CHILD. CODE ANN. art. 1051(B) (2017).

<sup>132</sup> LA. CHILD. CODE ANN. art. 1051(C) (2017).

<sup>133</sup> LA. CHILD. CODE ANN. art. 1051(D) (2017).



## APPENDIX A

### CONTACT INFORMATION FOR DCFS CHILD WELFARE REGIONAL OFFICES<sup>134</sup>

#### Alexandria

*Street Address*

900 Murray Street  
1st Floor, Room A-100  
Alexandria, LA 71309

*Mailing Address*

P.O. Box 832  
Alexandria, LA 71309-0832  
Phone: (318) 487-5054  
Fax: (318) 484-2178

*Parishes served: Avoyelles, Catahoula, Concordia, Grant, La Salle, Rapides, Vernon, Winn*

#### Lake Charles

*Street Address*

1919 Kirkman Street  
Lake Charles, LA 70601

*Mailing Address*

P.O. Box 1487  
Lake Charles, LA 70602  
Phone: (337) 491-2470  
Fax: (337) 475-3030

*Parishes served: Allen, Beauregard, Calcasieu, Cameron, Jefferson Davis*

#### Baton Rouge

*Street/Mailing Address*

627 North 4th Street  
Baton Rouge, LA 70802  
Phone: (225) 925-6500  
Fax: (225) 922-2922

*Parishes served: East Baton Rouge, East Feliciana, Iberville, Pointe Coupee, West Baton Rouge, West Feliciana*

#### Monroe

*Street Address*

24 Accent Drive, Suite 106  
Monroe, LA 71202

*Mailing Address*

P.O. Box 3047  
Monroe, LA 71210  
Phone: (318) 362-5417  
Fax: (318) 362-3013

*Parishes served: Caldwell, East Carroll, Franklin, Lincoln, Madison, Morehouse, Ouachita, Richland, Tensas, Union, West Carroll*

#### Covington

*Street/Mailing Address*

351 Holiday Boulevard  
Covington, LA 70433  
Phone: (985) 893-6363  
Fax: (985) 893-6366

*Parishes served: Livingston, St. Helena, St. Tammany, Tangipahoa, Washington*

#### Orleans

*Street Address*

1450 Poydras Street, Suite 1600  
New Orleans, LA 70112

*Mailing Address*

1450 Poydras Street, Suite 1831  
New Orleans, LA 70112  
Phone: (504) 568-7413  
Fax: (504) 568-7444

*Parishes served: Orleans*

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<sup>134</sup> DCFS Regional Offices, *available at*

<http://www.dcfslouisiana.gov/index.cfm?md=directory&search=1&catid=5&city=&zip=&parishID=0> (last visited Sept. 16, 2017).

**Jefferson***Street Address*

800 West Commerce Road, Suite 500  
Harahan, LA 70123

*Mailing Address*

P.O. Box 10009  
Jefferson, LA 70181  
Phone: (504) 736-7151  
Fax: (504) 736-7161

*Parishes served: Jefferson, Plaquemines, St. Bernard*

**Lafayette***Street Address*

825 Kaliste Saloom Road Brandywine 3  
Room 212  
Lafayette, LA 70508

*Mailing Address*

825 Kaliste Saloom Road Brandywine 2  
Suite 150  
Lafayette, LA 70508  
Phone: (337) 262-5901  
Fax: (337) 262-1092

*Parishes served: Acadia, Evangeline, Iberia, Lafayette, St. Landry, St. Martin, St. Mary, Vermilion*

**Shreveport***Street/Mailing Address*

1525 Fairfield Avenue, Room 850  
Shreveport, LA 71101-4388

Phone: (318) 676-7100

Fax: (318) 676-7084

*Parishes served: Bienville, Bossier, Caddo, Claiborne, De Soto, Jackson, Natchitoches, Red River, Sabine, Webster*

**Thibodaux***Street Address*

1416 Tiger Drive  
Thibodaux, LA 70301

*Mailing Address*

1000-A Plantation Road  
Thibodaux, LA 70301  
Phone: (985) 447-0945  
Fax: (985) 447-0875

*Parishes served: Ascension, Assumption, Lafourche, St. Charles, St. James, St. John the Baptist, Terrebonne*

## APPENDIX B

### CONTACT INFORMATION FOR DCFS CHILD WELFARE PARISH OFFICES<sup>135</sup>

#### Acadia

*Street Address*

300 East First Street  
Crowley, LA 70527

*Mailing Address*

P.O. Drawer 649  
Crowley, LA 70527-0649  
Phone: (337) 788-7503  
Fax: (337) 788-7545

#### Allen

*Street Address*

213-A North First Street  
Oberlin, LA 70655

*Mailing Address*

P. O. Drawer 280  
Oberlin, LA 70655  
Phone: (337) 639-2963  
Fax: (337) 639-4052

#### Ascension

*Street Address*

1078 E. Worthy Street, 1st Floor  
Gonzales, LA 70737  
Phone: (225) 644-4603  
Fax: (225) 647-9413

#### Assumption

*Street Address*

1416 Tiger Drive  
Thibodaux, LA 70302  
Phone: (985) 447-0945  
Fax: (985) 447-0875

#### Madison

*Street Address*

1707 Felicia Drive  
Tallulah, LA 71282  
Phone: (318) 574-5201  
Fax: (318) 574-2660

#### Morehouse

*Street Address*

1045 East Madison  
Bastrop, LA 71220

*Mailing Address*

P. O. Box 1488  
Bastrop, LA 71221  
Phone: (318) 283-0820  
Fax: (318) 283-0866

#### Natchitoches

*Street Address*

106 Charlene Street  
Natchitoches, LA 71457  
Phone: (318) 357-3128  
Fax: (318) 357-3298

#### Orleans

*Street Address*

1450 Poydras Street, Suite 1831  
New Orleans, LA 70112  
Phone: (504) 680-9100  
Fax: (504) 680-9103

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<sup>135</sup> DCFS Parish Offices Acadia—Grant, *available at* <http://www.dcfs.louisiana.gov/index.cfm?md=directory&search=1&catid=6&city=&zip=&parishID=0> (last visited Mar. 12, 2014).

**Avoyelles***Street Address*

607 Tunica Drive West  
Marksville, LA 71351  
Phone: (318) 253-7734  
Fax: (318) 253-5053

**Beauregard***Street Address*

1891 Hwy. 190 West  
DeRidder, LA 70634

*Mailing Address*

P. O. Drawer 1117  
DeRidder, LA 70634  
Phone: (337) 463-2069  
Fax: (337) 462-1473

**Bienville**

(This parish is served by the Webster office.)

*Street Address*

223 Pine Street  
Minden, LA 71055  
Phone: (318) 371-3004  
Fax: (318) 371-3083

**Bossier***Street Address*

1525 Fairfield Avenue, Room 424  
Shreveport, LA 71101  
Phone: (318) 676-7323  
Fax: (318) 676-7307

**Caddo***Street Address*

1525 Fairfield Avenue, Room 424  
Shreveport, LA 71101  
Phone: (318) 676-7323  
Fax: (318) 676-7307

**Ouachita***Street Address*

1401 Stubbs Ave.  
Monroe, LA 71201  
*Mailing Address*  
P. O. Box 2510  
Monroe, LA 71207-2510  
Phone: (318) 362-5417  
Fax: (318) 362-3055

**Plaquemines**

(This parish is served by the Jefferson – West Office.)

*Street Address*

2150 Westbank Expressway, Suite 601  
Harvey, LA 70058  
Phone: (504) 361-6161  
Fax: (504) 361-6105

**Pointe Coupee***Street Address*

1919 Hospital Road  
New Roads, LA 70760  
*Mailing Address*  
P. O. Box 729  
New Roads, LA 70760-0729  
Phone: (225) 638-4846  
Fax: (225) 638-9945

**Rapides***Street Address*

900 Murray Street, 2nd Floor  
Alexandria, LA 71301  
*Mailing Address*  
P. O. Box 832  
Alexandria, LA 71309  
Phone: (318) 487-5054  
Fax: (318) 487-5683

**Red River***Street Address*

106 Charlene Street  
Natchitoches, LA 71457  
Phone: (318) 357-3112  
Fax: (318) 357-3298

**Calcasieu***Street Address*

1919 Kirkman Street  
Lake Charles, LA 70601

*Mailing Address*

P. O. Box 1487  
Lake Charles, LA 70602  
Phone: (337) 491-2470  
Fax: (337) 491-3074

**Caldwell**

(This parish is served by the Ouachita office.)

*Street Address*

1401 Stubbs Avenue  
Monroe, LA 71201

*Mailing Address*

P. O. Box 2510  
Monroe, LA 71207-2510  
Phone: (318) 362-5417  
Fax: (318) 362-3055

**Cameron**

(This parish is served by the Calcasieu office.)

*Street Address*

1919 Kirkman Street  
Lake Charles, LA 70601

*Mailing Address*

P. O. Box 1487  
Lake Charles, LA 70602  
Phone: (337) 491-2470  
Fax: (337) 491-3074

**Catahoula***Street Address*

124 Airport Road  
Jonesville, LA 71343  
Phone: (318) 339-6030  
Fax: (318) 339-6049

**Claiborne**

(This parish is served by the Webster office.)

*Street Address*

223 Pine Street  
Minden, LA 71055  
Phone: (318) 371-3004  
Fax: (318) 371-3083

**Richland***Street Address*

111 Ellington Drive  
Rayville, LA 71269  
Phone: (318) 728-3037  
Fax: (318) 728-4938

**Sabine***Street Address*

195 Marthaville Road  
Many, LA 71449

*Mailing Address*

P. O. Box 1507  
Many, LA 71449  
Phone: (318) 256-4104  
Fax: (318) 256-4158

**St. Bernard**

(This parish is served by the Orleans office.)

*Street Address*

3510 General Meyer Avenue  
Algiers, LA 70114  
Phone: (504) 361-6800  
Fax: (504) 361-6374 or (504) 361-6420

**St. Charles**

(This parish is served by the St. John office.)

*Street Address*

429 West Airline Highway, Suite M  
LaPlace, LA 70068  
Phone: (504) 652-2938  
Fax: (985) 652-4074

**St. Helena**

(This parish is served by the Tangipahoa office.)

*Street Address*

606 South First Street  
Amite, LA 70422  
Phone: (985) 748-2001  
Fax: (985) 748-2083

**Concordia***Street Address*

1648 Carter Street  
Vidalia, LA 71373  
Phone: (318) 336-8611  
Fax: (318) 336-8697

**DeSoto***Street Address*

1525 Fairfield Ave, Room 424  
Shreveport, LA 71101  
Phone: (318) 676-7100  
Fax: (318) 676-7084

**East Baton Rouge***Street Address*

160 South Ardenwood  
Baton Rouge, LA 70806  
*Mailing Address*  
P. O. Box 1588  
Baton Rouge, LA 70821  
Phone: (225) 925-6500  
Fax: (225) 925-6800

**East Carroll**

(This parish is served by the Madison office).

*Street Address*

1707 Felicia Drive  
Tallulah, LA 71282  
Phone: (318) 574-5201  
Fax: (318) 574-2660

**East Feliciana***Street Address*

12476 Feliciana Drive  
Clinton, LA 70722  
*Mailing Address*  
P. O. Box 8427  
Clinton, LA 70722-8427  
Phone: (225) 683-3734  
Fax: (225) 683-9634

**St. James**

(This parish is served by the St. John office.)

*Street Address*

429 West Airline Highway, Suite M  
LaPlace, LA 70068  
Phone: (504) 652-2938  
Fax: (985) 652-4074

**St. John***Street Address*

429 West Airline Highway, Suite M  
LaPlace, LA 70068  
Phone: (504) 652-2938  
Fax: (985) 652-4074

**St. Landry***Street Address*

6069 I-49 S. Service Road, Suite C  
Opelousas, LA 70570  
Phone: (337) 942-0050  
Fax: (337) 948-0233

**St. Martin***Street Address*

1109 South Main Street, 2nd Floor  
St. Martinville, LA 70582  
*Mailing Address*  
P. O. Box 259  
St. Martinville, LA 70582  
Phone: (337) 394-6081  
Fax: (337) 394-6335

**St. Mary***Street Address*

604 Second Street  
Franklin, LA 70538  
Phone: (337) 828-5278  
Fax: (337) 828-5919

**Evangeline***Street Address*

116 SW Railroad St., Ste A  
Ville Platte, LA 70586  
Phone: (337) 363-6011  
Fax: (337) 363-7472

**Franklin***Street Address*

2406 West Street  
Winnsboro, LA 71295  
Phone: (318) 435-2188  
Fax: (318) 435-2177

**Grant***Street Address*

602 Main Street  
Colfax, LA 71417  
Phone: (318) 627-3000  
Fax: (318) 627-3508

**Iberia***Street Address*

705 Bayard Street  
New Iberia, LA 70560  
Phone: (337) 373-0029  
Fax: (337) 373-0150

**Iberville***Street Address*

23075 Highway 1  
Plaquemine, LA 70764  
*Mailing Address*  
P. O. Box 778  
Plaquemine, LA 70764  
Phone: (225) 687-4373  
Fax: (225) 687-2129

**St. Tammany***Street Address*

300 Covington Center – Suite 1  
Covington, LA 70433  
Phone: (985) 893-6225  
Fax: (985) 893-6324

**Tangipahoa***Street Address*

606 South First Street  
Amite, LA 70422  
Phone: (985) 748-2001  
Fax: (985) 748-2083

**Tensas**

(This parish is served by the Madison office.)

*Street Address*

1705 Felicia Drive  
Tallulah, LA 71282  
Phone: (318) 574-5201  
Fax: (318) 574-2660

**Terrebonne***Street Address*

1012 West Tunnel Blvd.  
Houma, LA 70360  
*Mailing Address*  
P.O. Box 3100  
Houma, LA 70361  
Phone: (985) 857-3630  
Fax: (985) 873-2012

**Union***Street Address*

206 East Reynolds Drive, Suite J  
Ruston, LA 71270  
Phone: (318) 251-4106  
Fax: (318) 513-6828

**Jackson**

(This parish is served by the Webster office.)

*Street Address*

223 Pine Street  
Minden, LA 71055  
Phone: (318) 371-3004  
Fax: (318) 371-3083

**Jefferson – East***Street Address*

3510 General Meyer Avenue  
Algiers, LA 70114  
Phone: (504) 361-6800  
Fax: (504) 361-6374 or (504) 361-6420

**Jefferson – West***Street Address*

2150 Westbank Expressway, Suite 601  
Harvey, LA 70058  
Phone: (504) 361-6161  
Fax: (504) 361-6105

**Jefferson Davis***Street Address*

107 North Cutting Ave.  
Jennings, LA 70546  
*Mailing Address*  
P. O. Box 1103  
Jennings, LA 70546  
Phone: (337) 824-9649  
Fax: (337) 824-9526

**Lafayette***Street Address*

825 Kaliste Saloom Road  
Building II - Suite 104  
Lafayette, LA 70508  
Phone: (337) 262-5901  
Fax: (337) 262-1179

**Vermilion***Street Address*

2729 Veterans Memorial Drive  
Abbeville, LA 70510  
*Mailing Address*  
P. O. Box 849  
Abbeville, LA 70511-0849  
Phone: (337) 898-1430  
Fax: (337) 898-1413

**Vernon***Street Address*

300 Vernon Street  
New Llano, LA 71461  
*Mailing Address*  
P. O. Box 190  
New Llano, LA 71461  
Phone: (337) 238-7030  
Fax: (337) 238-6494

**Washington***Street Address*

1017 Ontario Ave.  
Bogalusa, LA 70427  
Phone: (985) 732-6800  
Fax: (985) 732-6826

**Webster***Street Address*

223 Pine Street  
Minden, LA 71055  
Phone: (318) 371-3004  
Fax: (318) 371-3083

**West Baton Rouge**

(This parish is served by the Iberville office.)

*Street Address*

23075 Highway 1  
Plaquemine, LA 70764  
*Mailing Address*  
P. O. Box 778  
Plaquemine, LA 70764  
Phone: (225) 687-4373  
Fax: (225) 687-2129



**Lafourche***Street Address*

1416 Tiger Drive  
Thibodaux, LA 70302  
Phone: (985) 447-0945  
Fax: (985) 447-0875

**LaSalle**

(This parish is served by the Catahoula office.)

*Street Address*

124 Airport Road  
Jonesville, LA 71343  
Phone: (318) 339-6030  
Fax: (318) 339-6049

**Lincoln***Street Address*

200 East Reynolds Drive, Suite A-2  
Ruston, LA 71270  
Phone: (318) 251-4101  
Fax: (318) 251-4104

**Livingston***Street Address*

28446 Charley Watts Rd.  
Livingston, LA 70754

*Mailing Address*

P. O. Box 267  
Livingston, LA 70754  
Phone: (225) 686-7257  
Fax: (225) 686-9886

**West Carroll**

(This parish is served by the Richland office.)

*Street Address*

111 Ellington Drive  
Rayville, LA 71269  
Phone: (318) 728-3037 or (318) 728-3098  
Fax: (318) 728-4938

**West Feliciana**

(This parish is served by the East Feliciana office.)

*Street Address*

12476 Feliciana Drive  
Clinton, LA 70722

*Mailing Address*

P. O. Box 8427  
Clinton, LA 70722-8427  
Phone: (225) 683-3734  
Fax: (225) 683-9634

**Winn***Street Address*

1408 East Lafayette Street  
Winnfield, LA 71483

*Mailing Address*

P. O. Box 231  
Winnfield, LA 71483  
Phone: (318) 648-6805  
Fax: (318) 648-6905

## CHAPTER 19: TEMPORARY RELEASE\*

### A. INTRODUCTION

A furlough is a temporary release that allows a prisoner to leave the prison for a limited amount of time. In Louisiana, it is possible to get furloughs for medical reasons.<sup>1</sup> It may also be possible for you to join a work release program. Remember: not every institution offers every program. Whether the program is available to you depends on your institution.

Temporary release is a privilege.<sup>2</sup> If you are on temporary release from prison, you do not have a reasonable expectation of privacy. Law enforcement officers do not have to show probable cause to search you.<sup>3</sup> Even though you are not in prison, you are still technically in the custody of the state. This is called “constructive custody.”<sup>4</sup> Furthermore, the authorities can cancel your furlough at any time.<sup>5</sup>

Part B of this chapter explains the basic types of temporary release programs. Part C will explain how you can be eligible for these programs. Part D will explain the procedure for challenging a decision regarding your furlough status.

### B. OVERVIEW OF TEMPORARY RELEASE PROGRAMS

As described in Chapter 39 of the main *Jailhouse Lawyer’s Manual (JLM)*, not all facilities offer the same temporary release programs. You should check with your institution to see what kinds of programs are offered and what you must do to participate. This can depend on your parish, because sheriffs of different parishes can create different rules regarding these programs.<sup>6</sup> The two general types of programs offered in Louisiana are furloughs and work release. It can be difficult to get into these programs. There are no public statistics for Louisiana, but Chapter 39 of the main *JLM* records the statistics for admission rates to temporary release programs in New York.

#### 1. Furloughs

Now, furloughs are only available for medical reasons.<sup>7</sup> It allows you to maintain contact with your family during your sentence.<sup>8</sup>

##### a. Medical Furloughs

The secretary may authorize your temporary release for medical care in certain situations.<sup>9</sup> You may be eligible for this type of release if you have a terminal illness and are expected to die within sixty days. You may also be eligible if you have a condition that prevents mobility and requires an acute care hospital or nursing facility. Such types of conditions include, but are not limited to, a prolonged coma or mechanical ventilation (breathing).<sup>10</sup> Inmates sentenced to death are not eligible for medical furloughs.<sup>11</sup> If you are furloughed, you will be released to a medical facility for treatment.

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\* This Supplement Chapter was written by Sean Nelson.

<sup>1</sup> LA. REV. STAT. ANN. § 15:833(B)(1) (2017) (“The secretary [of the Department of Public Safety and Corrections] may . . . authorize furloughs to deserving inmates of any adult correctional institution.”).

<sup>2</sup> See, e.g. *James v. Hertzog*, 415 Fed. App’x. 530 (5th Cir. 2011) (inmate lost an appeal of his denial of request to participate in a work release program due to his behavior; the court noted that furloughs are a privilege, not a right or entitlement belonging to a prisoner).

<sup>3</sup> *State v. Williams*, 490 So. 2d 255, 260 (La. 1986) (citing *State v. Patrick*, 381 So. 2d 501, 503 (La. 1980)).

<sup>4</sup> *State v. Williams*, 490 So. 2d 255, 260 (La. 1986).

<sup>5</sup> *State v. Williams*, 490 So. 2d 255, 260 (La. 1986).

<sup>6</sup> LA. REV. STAT. ANN. § 15:711 (A), (B) (2017).

<sup>7</sup> On May 20, 2011, LA. ADMIN. CODE tit. 22 § 305(I), providing for non-medical furloughs, was repealed.

<sup>8</sup> LA. REV. STAT. ANN. §§ 15:811, 15:833(B)(1) (2017) (The “furlough is intended to serve as a rehabilitation tool to assist the inmate in maintaining family relationships during the period of his incarceration.”).

<sup>9</sup> LA. REV. STAT. ANN. § 15:833.2(A) (2017).

<sup>10</sup> LA. REV. STAT. ANN. § 15:833.2(A) (2017).

If an inmate is released from the acute care facility or refuses further treatment, the furlough will be immediately terminated.<sup>12</sup>

b. Non-Medical Furloughs

Although Louisiana statutory law permits the Department of Corrections to enact policies permitting non-medical furloughs, no regulations currently provide for these temporary releases.<sup>13</sup> For this reason, non-medical furloughs are no longer available.

## 2. Work Release

The sheriff of each parish has the power to start and run a work release program for his jurisdiction.<sup>14</sup> If an inmate's sentence says that he cannot participate in work release, he is not eligible for the program.<sup>15</sup> Beyond this, the sheriff establishes written rules.<sup>16</sup> If an inmate violates the sheriff's rules or conditions, the inmate's work release privileges may be revoked.<sup>17</sup> If you are approved for work release, you may be placed at universities, colleges, technical, vocational, or trade schools, or in sheltered workshops or training programs designed to improve your skills and work abilities.<sup>18</sup>

If you are approved for work placement, then you will be responsible for the cost of your room, board, clothing, and other related expenses.<sup>19</sup> The sheriff or your designated agent will collect your salary and place it in a bank.<sup>20</sup> The money that you make will be used to pay off the following expenses, in the following order: (1) your board, food, clothing, and medical expenses; (2) necessary travel expenses to and from work as well as your other incidental expenses; (3) support of your dependents if you have any; (4) payment of any credit judgments against you; and (5) to you at the end of your sentence.<sup>21</sup> You will make the same salary as non-work release employees who perform similar work.<sup>22</sup> Finally, you will not be allowed to travel out of state unless your program employs you in an industry off the coast of Louisiana.<sup>23</sup>

a. Jefferson Davis Work Release Program

In addition to those work release programs authorized in each parish, there is a separate work release program created under Louisiana law for the Jefferson Davis parish. The sheriff of Jefferson Davis parish is authorized to establish a work release program for inmates in his jurisdiction who have been convicted of misdemeanors.<sup>24</sup> The Jefferson Davis sheriff is responsible for establishing the written rules for this program.<sup>25</sup> These rules may determine, among other things, (1) who is eligible to participate in the work release program, (2) conditions to be observed while released, (3) the use of the money earned, and (4) the reduction of one's sentence for participating in the program.<sup>26</sup> Diminution (the reduction of your

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<sup>11</sup> LA. REV. STAT. ANN. § 15:833.2(A) (2017).

<sup>12</sup> LA. REV. STAT. ANN. § 15:833.2(C) (2017) ("Any inmate authorized for temporary release pursuant to the provisions of this Section who is released, discharged, or who absconds from an acute care hospital or nursing home shall have such temporary release immediately rescinded.").

<sup>13</sup> LA. REV. STAT. ANN. § 15:833(B)(1) (2017) ("The secretary [of the Department of Public Safety and Corrections] may . . . authorize furloughs to deserving inmates of any adult correctional institution.").

<sup>14</sup> LA. REV. STAT. ANN. § 15:711(A) (2017). If the inmate is incarcerated at a facility not operated by the sheriff, the superintendent of the facility has the power to authorize a work release program.

<sup>15</sup> LA. REV. STAT. ANN. § 15:711(B) (2017).

<sup>16</sup> LA. REV. STAT. ANN. § 15:711(B) (2017).

<sup>17</sup> LA. REV. STAT. ANN. § 15:711(B) (2017).

<sup>18</sup> LA. REV. STAT. ANN. § 15:711(B) (2017).

<sup>19</sup> LA. REV. STAT. ANN. § 15:711(C) (2017).

<sup>20</sup> LA. REV. STAT. ANN. § 15:711(D) (2017).

<sup>21</sup> LA. REV. STAT. ANN. § 15:711(E) (2017).

<sup>22</sup> LA. REV. STAT. ANN. § 15:711(F) (2017).

<sup>23</sup> LA. REV. STAT. ANN. § 15:711(H) (2017).

<sup>24</sup> LA. REV. STAT. ANN. § 15:711(A) (2017).

<sup>25</sup> LA. REV. STAT. ANN. § 15:711(A) (2017).

<sup>26</sup> LA. REV. STAT. ANN. § 15:711(A) (2017).

sentence) is only allowed if you spend each night in jail and cannot exceed one and one-third days of credit for each day served in the work release program.<sup>27</sup>

b. Disaster Provision

There is also a special type of work release under Louisiana law for responding to state emergencies.<sup>28</sup> The Secretary of the Department of Public Safety and Corrections is authorized to establish community resource centers to provide housing for inmates so that they may clean up the damage caused by a natural disaster or emergency.<sup>29</sup> You may be assigned to perform labor related to cleanup and rebuilding after a natural disaster, emergency, or other catastrophe if the following requirements are satisfied:<sup>30</sup>

- 1) The governor has declared a disaster or emergency in the parish where the work is to be performed, either by executive order or a proclamation under the Louisiana Homeland Security and Emergency Assistance Disaster Act;<sup>31</sup>
- 2) The secretary has approved your participation in disaster cleanup and rebuilding activities;<sup>32</sup> and
- 3) You are eligible for participation according to the rules/regulations put forth by the secretary and you have not been convicted of a crime of violence or certain sexual offenses.<sup>33</sup>

### C. ELIGIBILITY REQUIREMENTS

#### 1. Furloughs

a. Medical Furloughs

The secretary may allow the temporary release of a prisoner for palliative (treatment to reduce the pain but not cure the illness) or medical care when (1) the prisoner has been diagnosed with a terminal illness and death is expected within sixty days OR (2) when the prisoner has a condition that totally prevents mobility (such as a prolonged coma or the need for mechanical ventilation) and is to be confined to an acute care hospital (typically a short-term facility) or nursing home.<sup>34</sup>

Neither type of medical furlough is available to prisoners sentenced to death.<sup>35</sup> Additionally, the second kind of temporary release (for immobile prisoners confined to acute care hospitals or nursing homes) is not available to those serving a sentence for first degree murder, second degree murder, attempted murder, aggravated rape, attempted aggravated rape, forcible rape, aggravated kidnapping, aggravated arson, armed robbery, attempted armed robbery, a habitual felony conviction under R.S. 15:529.1,<sup>36</sup> or one of the following drug offenses: producing, manufacturing, distributing or dispensing or possession with intent to produce, manufacture, distribute or dispense a Schedule I or II controlled dangerous substance (under R.S. 40:964).<sup>37</sup> If you are granted this second type of medical furlough and you are later released or discharged from the acute care hospital or nursing home, your temporary release will immediately be cancelled.<sup>38</sup> If you flee from the acute care hospital or nursing home or if you refuse further treatment at the care facility, your temporary release will immediately be cancelled.<sup>39</sup>

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<sup>27</sup> LA. REV. STAT. ANN. § 15:711(A) (2017).

<sup>28</sup> LA. REV. STAT. ANN. § 15:833.1(A) (2017).

<sup>29</sup> LA. REV. STAT. ANN. § 15:833.1(A) (2017).

<sup>30</sup> LA. REV. STAT. ANN. § 15:833.1(B) (2017).

<sup>31</sup> LA. REV. STAT. ANN. § 15:833.1(B)(1) (2017).

<sup>32</sup> LA. REV. STAT. ANN. § 15:833.1(B)(3) (2017).

<sup>33</sup> LA. REV. STAT. ANN. § 15:833.1(C) (2017).

<sup>34</sup> LA. REV. STAT. ANN. § 15:833.2(A) (2017).

<sup>35</sup> LA. REV. STAT. ANN. § 15:833.2(A) (2017).

<sup>36</sup> LA. REV. STAT. ANN. § 15:833.2(B) (2017). R.S. (Revised Statute) § 15.529.1 is a Louisiana law that details sentences for repeat offenders.

<sup>37</sup> LA. REV. STAT. ANN. § 15:833.2(B) (2017). LA. REV. STAT. ANN § 40:694 is a Louisiana law that lists the names of various drugs.

<sup>38</sup> LA. REV. STAT. ANN. § 15:833.2(C) (2017).

<sup>39</sup> LA. REV. STAT. ANN. § 15:833.2(C) (2017).

## 2. Work Release

To be able to participate in a work release program, you must meet your department's standards for work release and get written approval from the secretary of your department.<sup>40</sup> If you violate the conditions of the sheriff, your work release privileges may be taken away.<sup>41</sup> If you fail to report or fail to return from your planned employment, that failure will be considered an escape under R.S. 14:110.<sup>42</sup>

If you have been convicted of forcible rape, aggravated arson, armed robbery, attempted murder, attempted armed robbery, or sentenced as a habitual offender under R.S. 15:529.1,<sup>43</sup> then you are only eligible for work release during the last *six months* of your term.<sup>44</sup> There is an exception, however. Unless you are already eligible at an earlier date, if you have served for a minimum of fifteen years for one of these crimes, then you may participate in a work release program during the last *twelve months* of your term.<sup>45</sup>

Additionally, if you have been convicted of producing, manufacturing, distributing, dispensing, or possession with intent to produce, manufacture, distribute, or dispense a controlled dangerous substance classified in R.S. 40:964,<sup>46</sup> then you are still eligible for work release if you observe the other work release standards.<sup>47</sup>

Because work release is a privilege rather than a right, you do not have a legal claim to it (if something is a right, you are always guaranteed it from birth. If it is a privilege, it can be taken away from you).<sup>48</sup> The sheriff of each parish runs the program and decides who may participate.<sup>49</sup> Even if you are qualified for work release, you have no legal right to be granted it and cannot challenge denial of it on the ground that you were legally eligible for it. For example, if you do not believe that you were given a fair opportunity to defend yourself against allegations of bad behavior and this is why the sheriff denied you work release, you cannot challenge his decision.<sup>50</sup> There may be an exception to this, however. If you *are* a member of a *protected class* (that is, you are a member of a minority race, religion, ethnicity, sexual orientation, are physically disabled, etc.), you could potentially bring a claim under the Equal Protection Clause of the United States Constitution.<sup>51</sup>

You are not qualified for a disaster relief work release if you have been convicted of a crime of violence, as defined in R.S. 14:2(B)<sup>52</sup> or if you have been convicted of a sex offense as defined in R.S. 15:541.<sup>53</sup> If you participate in this type of work release, you will be able to earn thirty days of good time in addition to that otherwise authorized by law for every thirty days you serve in the program.<sup>54</sup>

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<sup>40</sup> LA. REV. STAT. ANN. § 15:711(B) (2017).

<sup>41</sup> LA. REV. STAT. ANN. § 15:711(B) (2017).

<sup>42</sup> LA. REV. STAT. ANN. § 15:711(2017). R.S. (Revised Statute) § 14:110 is a Louisiana law that details the meaning of escape.

<sup>43</sup> LA. REV. STAT. ANN. § 15:711(G)(1) (2017).

<sup>44</sup> LA. REV. STAT. ANN. § 15:711(G)(1) (2017).

<sup>45</sup> LA. REV. STAT. ANN. § 15:711(G)(1) (2017).

<sup>46</sup> LA. REV. STAT. ANN. § 40:964 (2017). R.S. (Revised Statute) 40:964 is a Louisiana law that lists the names of various drugs.

<sup>47</sup> LA. REV. STAT. ANN. § 15:711(G)(2) (2017).

<sup>48</sup> *James v. Herzog*, 415 Fed. App'x. 530, 532 (5th Cir. 2011) (quoting *Bulger v. United States Bureau of Prisons*, 65 F.3d 48, 50 (1995) (denying an equal protection claim of a gay prisoner who was denied work release privileges because homosexuals are not a protected class of citizens)).

<sup>49</sup> LA. REV. STAT. ANN. § 15:711(A), (B) (2017).

<sup>50</sup> *James v. Herzog*, 415 Fed. App'x. 530, 532 (5th Cir. 2011).

<sup>51</sup> For more details on claims alleging a violation of equal protection, please see Chapter 8 of this Supplement or Chapter 16 of the main *Jailhouse Lawyer's Manual*.

<sup>52</sup> LA. REV. STAT. ANN. § 14:2 (B) (2017).

<sup>53</sup> LA. REV. STAT. ANN. § 15:541 (2017).

<sup>54</sup> LA. REV. STAT. ANN. § 15:833.1(E) (2017).

## D. CHALLENGING A FURLOUGH DECISION

The sheriff or supervisor of your institution almost exclusively decides whether to grant your work release or furlough (in other words, it is the sheriff or supervisor's decision and no one else's).<sup>55</sup> Your ability to challenge the sheriff's decision is limited as well. The 5th Circuit Court of Appeals has determined that failure to grant a prisoner work release privileges does not constitute "cruel and unusual punishment" under the Eighth Amendment.<sup>56</sup> Furthermore, because the law grants only the sheriff the decision whether or not to provide work release, prisoners are generally not guaranteed a right to challenge the justifications (bad behavior, etc.) on which denial has been based as a matter of due process.<sup>57</sup> And although a law may in some cases imply that you are eligible for work release programs, if the law does not say anything specifically regarding approval, it fails to create a liberty interest to serve as the basis of a due process violation (in other words, it must be clear from the law that you have the ability to challenge the decision).<sup>58</sup> While there are a few grounds to challenge denial that will be mentioned in the next paragraph, it is important that you do not challenge a denial of work release privileges without a good reason. If the federal court decides that the complaint or appeal is not well-reasoned, this will count as a "strike" for the purposes of 28 U.S.C. § 1915(g),<sup>59</sup> which limits the number of poorly-reasoned challenges a prisoner can bring while in prison.<sup>60</sup>

Although it is difficult to challenge denial of a furlough decision, there are two cases in which courts have suggested it may be a possibility. First, plaintiffs in § 1983 claims can claim that a state actor intentionally discriminated against him because he was a member of a *protected class*.<sup>61</sup> Additional details on this type of claim can be seen in Chapter 6 of the *Louisiana State Supplement* and Chapter 16 of the main *JLM*. Additionally, the Federal Court of Appeals for the Fifth Circuit has ruled that a correction authority's failure to follow its own procedures in rejecting an application for work release could be the basis for a claim for relief.<sup>62</sup> If it can be shown that the sheriff or superintendent disregarded official procedures in denying your application for work release, the basis for a due process claim may exist. This may be difficult to show in Louisiana, however, as the language in the statute is vague and gives the sheriff or superintendent more power to make that decision than prisoners.<sup>63</sup>

## E. CONCLUSION

Under very limited circumstances, you may be eligible for furlough, or temporary release from prison. The secretary of the Department of Public Safety and Corrections may grant you medical furlough if you have been diagnosed with a terminal illness and are expected to die within sixty days. The secretary may also grant you medical furlough if you suffer from a medical condition which causes you to be completely immobile.

You may be granted temporary work release if 1) your facility offers work release; 2) you meet the criteria set forth by state law and your facility; and 3) you obtain written approval from the secretary of the Department of Public Safety and Corrections. Furlough, especially work release, is a privilege, not a right. Your ability to challenge a denial or revocation of work release is extremely limited. However, you may be able to challenge a denial of work release if the sheriff or superintendent of your facility did not

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<sup>55</sup> LA. REV. STAT. ANN. § 15:711(A), (B) (2017). ("Each sheriff . . . shall determine those inmates who may participate in the release program, except that no inmate may participate in the program if his sentence so stipulates.").

<sup>56</sup> James v. Herzog, 415 Fed. App'x. 530, 533 (5th Cir. 2011).

<sup>57</sup> James v. Herzog, 415 Fed. App'x. 530, 532 (5th Cir. 2011) (citing Meachum v. Fano, 427 U.S. 215, 226–229 (1976)).

<sup>58</sup> Welch v. Thompson, 20 F.3d 636, 643 (5th Cir. 1994); see also Ard v. Leblanc, 404 Fed. App'x. 928, 929 (5th Cir. 2010) (quoting Rublee v. Fleming, 160 F.3d 213, 217 (5th Cir. 1998)) ("A protected liberty interest exists only when a [statute] or regulation uses mandatory language to place a substantive limit on official discretion.").

<sup>59</sup> James v. Herzog, 415 Fed. App'x. 530, 533 (5th Cir. 2011).

<sup>60</sup> 28 U.S.C. § 1915(g) (2012) states that an inmate may not bring a civil action or appeal under the section if the prisoner has, on 3 or more prior instances while incarcerated, had civil actions or appeals dismissed as frivolous, malicious or for failure to state a claim, unless the prisoner is in imminent danger.

<sup>61</sup> James v. Herzog, 415 Fed. App'x. 530, 532 (5th Cir. 2011).

<sup>62</sup> Finley v. Staton, 542 F.2d 250 (5th Cir. 1976). (It is important to note that this case involved Alabama laws and procedures and was decided by the Fifth Circuit prior to its split.)

<sup>63</sup> LA. REV. STAT. ANN. § 15:711(B) (2017).

follow official procedures when denying your application. You may also be able to challenge a denial of work release if you are a member of a protected class and your denial was based on intentional discrimination. *See* Chapter 6 of the *Louisiana State Supplement* and Chapter 16 of the main *JLM* for more information on bringing a claim based on intentional discrimination.

## CHAPTER 20: GETTING OUT EARLY—CONDITIONAL AND EARLY RELEASE

### A. INTRODUCTION

This Chapter focuses on conditional and early release in the state of Louisiana. Chapter 35 of *A Jailhouse Lawyer's Manual (JLM)* also discusses conditional and early release for prisoners, but that chapter deals mostly with New York laws. If you are looking for what your rights are in the state of Louisiana, you should focus on this Chapter. This Chapter reviews the different ways (other than parole) that you can be released before serving your maximum, or full sentence in Louisiana. For information on parole, see Chapter 21 of the *Louisiana State Supplement*.

Part B of this Chapter discusses Louisiana sentencing structure and procedure. This Section provides general information and definitions to help you understand your sentence. Part C discusses probation and probation programs, which delay your sentence before you serve any time in prison. Part D discusses early release programs in Louisiana that may allow you to be released before you have served your full sentence. This includes early release for good behavior, Transitional Work Programs, and substance abuse conditional release programs. Part E discusses commutations, which will shorten the length of your sentence, and pardons.

### B. LOUISIANA SENTENCING STRUCTURE

#### 1. Sentencing Procedure

A sentence is the penalty given to you by the court after you are found to be guilty.<sup>1</sup> Your sentence must be announced orally, or read aloud, in open court and recorded by the court.<sup>2</sup> This sentence must be clearly pronounced on each count, or each crime, of which you were convicted.<sup>3</sup> For example, if you were convicted of one count of battery and one count of burglary, the court must announce a sentence for each of the two counts.

Your attorney must be present during your sentencing hearing, but he or she does not have to be present when your sentence is announced.<sup>4</sup> If your attorney was not present during your sentencing hearing, the court must remand, or send your case back to court, for resentencing.<sup>5</sup>

While the judge must consider certain guidelines, he or she has the freedom to ignore the guidelines and give you any sentence that is within the legal limit for your crime.<sup>6</sup>

#### 2. Challenging Your Sentence

There are several ways to challenge a sentence given to you by the Louisiana courts. Your sentence must be based on a valid and sufficient statute.<sup>7</sup> Your sentence must also be based on a valid verdict (in cases where the jury decides you are guilty), judgment (in cases where the judge decides you are guilty), or plea (when you agree to plead guilty).<sup>8</sup> You may challenge your sentence by challenging the constitutionality of the statute. If a statute is unconstitutional, your sentence is invalid.<sup>9</sup> In Louisiana, the “statute” includes local ordinances.<sup>10</sup>

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<sup>1</sup> LA. CODE CRIM. PROC. ANN. art. 871(A) (2017).

<sup>2</sup> LA. CODE CRIM. PROC. ANN. art. 871(A) (2017).

<sup>3</sup> State v. Davis, 581 So. 2d 1013, 1013 (La. App. 3 Cir. 1991).

<sup>4</sup> State v. Williams, 374 So. 2d 1215, 1217 (La. 1979); State v. Hughes, 129 So. 637, 638 (La. 1930).

<sup>5</sup> State v. Williams, 374 So. 2d 1215, 1217 (La. 1979).

<sup>6</sup> State v. Smith, 93-0402, p. 3 (La. 7/5/94); 639 So. 2d 237, 240; State v. Nelson, 95-1202, p. 11 (La. App. 1 Cir. 4/30/96); 674 So. 2d 329, 336.

<sup>7</sup> LA. CODE CRIM. PROC. ANN. art. 872(1) (2017).

<sup>8</sup> LA. CODE CRIM. PROC. ANN. art. 872(3) (2017).

<sup>9</sup> State v. Rawls, 161 La. 628, 630, 109 So. 146, 146–147 (La. 1926).

<sup>10</sup> LA. CODE CRIM. PROC. ANN. art. 872 cmt. b (2017).



You may also challenge your sentence by arguing that the verdict, judgment, or plea of guilty was not valid or sufficient. For example, a valid sentence cannot be based on a verdict that is not responsive to the indictment.<sup>11</sup> Also, the verdict must contain findings that are essential to punishment. This is especially true in all cases where the degree of guilt depends on a decision between different levels of crime, for example, theft, simple arson, and simple criminal damage to property.<sup>12</sup>

You may also challenge your sentence by arguing that the length of your sentence is excessive, or too much, for the crime. For a sentence to be excessive, the Court of Appeal must find that penalty is so grossly disproportionate (unbalanced or out of proportion) to the severity of crime that it shocks the sense of justice, or that the sentence does not benefit any acceptable goals and is nothing more than giving needless pain and suffering.<sup>13</sup> However, because the judge has a lot of freedom to decide what your sentence is, if the length of your sentence was within the legal limits, it is very unlikely to be excessive.<sup>14</sup>

### 3. Concurrent and Consecutive Sentences

If you are convicted of two or more offenses, you will receive a sentence for each offense. You may either serve these sentences at the same time or one after the other. Sentences are called “concurrent” when you serve two or more sentences at the same time. For example, if you were sentenced to five years for one count, and five years for another count, and you served them concurrently, you would be serving five years total. On the other hand, if you served them consecutively, you would serve one after another, for a total of ten years.

If you are convicted of two or more offenses based on the same act, transaction, or plan, you will serve your sentences concurrently unless the court clearly tells you that all or some of your sentences will be served consecutively.<sup>15</sup>

Sentences of imprisonment that do not come from the same act, transaction, or plan will usually be served consecutively unless the court clearly says that all or some will be served concurrently.<sup>16</sup> For example, if you stole a car one day and forged a check a month later for unrelated reasons, it will be unlikely that the two crimes came from the same act or plan.

The sentencing judge has the authority to impose either concurrent or consecutive sentences.<sup>17</sup> This means that the judge may impose concurrent sentences even if the offenses took place at different times, or the judge may impose consecutive sentences even though the offenses took place at the same time.

The judge may consider many factors when deciding whether to impose concurrent or consecutive sentences. The judge may consider your criminal history, the dangerousness of your crime, the harm done to the victims, whether you pose an unusual risk of danger to the public, the potential for your rehabilitation, and whether you received a benefit from a plea bargain.<sup>18</sup> The more dangerous your crime was, the more likely it is for the judge to give you a consecutive sentence.

If the judge is in any way unclear or ambiguous as to whether multiple sentences will be served concurrently or consecutively, the general rule is that if the sentences are for offenses arising out of the same act or out of related criminal conduct, they will be served concurrently because it is likely that the

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<sup>11</sup> State v. Robertson, 111 La. 809, 811, 35 So. 916, 916–917 (La. 1904); State v. Gendusa, 190 La. 422, 429, 182 So. 559, 561 (La. 1938).

<sup>12</sup> LA. CODE CRIM. PROC. ANN. art. 872 cmt. d (2017).

<sup>13</sup> State v. Taylor, 95-179, p. 10 (La. App. 3 Cir. 10/4/95); 663 So. 2d 336, 343; see LA. CONST. art. I, § 20.

<sup>14</sup> State v. Nelson, 95-1202, pp. 11–12 (La. App. 1 Cir. 4/30/96); 674 So. 2d 329, 336.

<sup>15</sup> LA. CODE CRIM. PROC. ANN. art. 883 (2017).

<sup>16</sup> LA. CODE CRIM. PROC. ANN. art. 883 (2017).

<sup>17</sup> LA. CODE CRIM. PROC. ANN. art. 883 (2017).

<sup>18</sup> State v. Banks, 48-868, p. 17 (La. App. 2 Cir. 2/26/14); 134 So. 3d 1235, 1246.

judge would have given concurrent sentences.<sup>19</sup> If the convictions are for offenses that did not arise out of the same or related criminal conduct, the sentences will be served consecutively.<sup>20</sup>

### C. PROBATION

If you are on probation it means that your sentence has been suspended, or delayed, and you have been placed under supervision, instead of serving time.<sup>21</sup> After you have been sentenced, the judge may decide to suspend or defer your sentence. Both suspension and deferral will delay your sentence, but if your sentence has been deferred, your conviction and sentence may be thrown out after you complete your period of probation.<sup>22</sup> Unlike parole, you may not have to spend any time in custody because your sentence has been suspended or deferred by the judge. You must not be convicted of another crime while on probation.<sup>23</sup>

Conditions of your probation may include requirements such as reporting to the probation officer, not owning or possessing firearms, and performing community service work.<sup>24</sup> If you violate any of the conditions of your probation, there may be an arrest and a hearing, where the judge may decide to let you off with a warning, or add more conditions to your probation.<sup>25</sup> The judge may also decide to revoke (take back) your probation, which would result in you having to serve your sentence in prison.<sup>26</sup>

#### 1. Misdemeanor Cases

If you have been convicted of a misdemeanor that is not criminal neglect of family, or stalking, the court may suspend all or part of your sentence and place you on probation.<sup>27</sup> Your probation may be unsupervised probation or supervised probation.<sup>28</sup> Your probation period should be for a period of two years or shorter.<sup>29</sup> The period of the suspended sentence and probation may be longer than the sentence imposed, but it may not be longer than two years.<sup>30</sup> The term of the probationary period cannot exceed one year if your sentence is less than 90 days.<sup>31</sup>

The court may also suspend, reduce, or amend a misdemeanor sentence after you have started to serve your sentence.<sup>32</sup> If your case is drug-related and your case has been assigned to the drug division probation program,<sup>33</sup> the court may place you on probation for a period of eight years or less if the court determines that successful completion of the program may require that the period of probation should be longer than the two-year limit.<sup>34</sup> Similarly, if your case is assigned to an established driving while intoxicated court or sobriety court program certified by the Louisiana Supreme Court Drug Court Office, the National Highway Traffic Safety Administration, or the Louisiana Highway Safety Commission, the court may place you on probation for any period of not more than eight years.<sup>35</sup>

If your sentence has been deferred by the court, and the court finds at the end of the period of deferral that you have not been convicted of any other offense during the period of the deferred sentence, and that no criminal charge is pending against you, the court may set the conviction aside and dismiss the

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<sup>19</sup> Official Revision Comment, LA. CODE CRIM. PROC. ANN. art. 883 (2017).

<sup>20</sup> LA. CODE CRIM. PROC. ANN. art. 883 (2017).

<sup>21</sup> LA. CODE CRIM. PROC. ANN. art. 893 (2017); LA. CODE CRIM. PROC. ANN. art. 894 (2017).

<sup>22</sup> LA. CODE CRIM. PROC. ANN. art. 894(B)(1) (2017).

<sup>23</sup> LA. CODE CRIM. PROC. ANN. art. 894 cmt. a (2017).

<sup>24</sup> LA. CODE CRIM. PROC. ANN. art. 895(A) (2017).

<sup>25</sup> LA. CODE CRIM. PROC. ANN. art. 899(A) (2017); LA. CODE CRIM. PROC. ANN. art. 900(A) (2017).

<sup>26</sup> LA. CODE CRIM. PROC. ANN. art. 900(A)(5)(a) (2017) (effective November 1, 2017).

<sup>27</sup> LA. CODE CRIM. PROC. ANN. art. 894(A)(1) (2017).

<sup>28</sup> LA. CODE CRIM. PROC. ANN. art. 894(A)(1) (2017).

<sup>29</sup> LA. CODE CRIM. PROC. ANN. art. 894(A)(1) (2017).

<sup>30</sup> LA. CODE CRIM. PROC. ANN. art. 894 cmt. c (2017); *State v. Pontiff*, 490 So. 2d 414, 416 (La. App. 5 Cir. 1986).

<sup>31</sup> *State v. Parker*, 423 So. 2d 1121, 1123 (La. 1982).

<sup>32</sup> LA. CODE CRIM. PROC. ANN. art. 894(A)(4) (2017).

<sup>33</sup> LA. REV. STAT. ANN. § 13:5304 (2017).

<sup>34</sup> LA. CODE CRIM. PROC. ANN. art. 894(A)(6) (2017).

<sup>35</sup> LA. CODE CRIM. PROC. ANN. art. 894(A)(7) (2017).

prosecution.<sup>36</sup> The dismissal of the prosecution will have the same effect as an acquittal (meaning that you were not found guilty), but the conviction may be considered as a prior offense and you may be later charged as a multiple offender.<sup>37</sup> This type of dismissal can only happen to you once during a five-year period. However, if you have been convicted for operating a vehicle while intoxicated, dismissal may happen only once during a ten-year period.<sup>38</sup>

## 2. Felony Cases

If you have been convicted of a noncapital felony (any felony that cannot be punished by death) for the first or second time, the court may suspend your sentence and place you on probation under supervision.<sup>39</sup> The court may suspend all or a part of your sentence.<sup>40</sup> The period of probation may not be more than three years.<sup>41</sup> If it is your third conviction, the court may be able to suspend your sentence if the court decides that it is in your best interests and the best interests of the public, and the district attorney consents. The court will also consider if it otherwise could have been suspended if it was your second conviction, a violation of the Uniform Controlled Dangerous Substances Law, or a conviction for driving while intoxicated.<sup>42</sup> In that case, the court will impose additional requirements such as participation in certain programs.<sup>43</sup> Such suspension may also be granted for a fourth conviction if such suspension was not offered to you for your prior convictions of operating a vehicle while intoxicated.<sup>44</sup> The court may not suspend your sentence after you have already started serving your sentence.<sup>45</sup>

The court may also defer part or all of your sentence if you have been convicted of a noncapital felony (any felony that cannot be punished by death) for the first time.<sup>46</sup> If your sentence is deferred, you will be placed on probation under the supervision of the division of probation and parole.<sup>47</sup> Your sentence cannot be deferred for certain offenses, for example, if your conviction is for an offense or attempted offense that was violent or sexual, or for a violation of the Uniform Controlled Dangerous Substances Law punishable by a term of imprisonment of more than five years.<sup>48</sup>

If the court finds at the conclusion of the probationary period that your probation has been satisfactory, the court may set the conviction aside and dismiss the prosecution.<sup>49</sup> You will have to file a motion in order for the court to dismiss the prosecution.<sup>50</sup> Like misdemeanor cases, the dismissal of the prosecution will have the same effect as an acquittal (meaning that you were not found guilty). The conviction may be considered as a prior offense and you may be later charged as a multiple offender.<sup>51</sup>

## 3. Job Intervention Program

Under a job intervention program you will enter a guilty plea, but your sentence will be suspended or deferred. You will be placed on probation under the conditions of the job intervention program ordered by the court.<sup>52</sup> If you complete the job intervention program, and successfully complete

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<sup>36</sup> LA. CODE CRIM. PROC. ANN. art. 894(B)(1) (2017).

<sup>37</sup> LA. CODE CRIM. PROC. ANN. art. 894(B)(2) (2017).

<sup>38</sup> LA. CODE CRIM. PROC. ANN. art. 894(B)(2) (2017).

<sup>39</sup> LA. CODE CRIM. PROC. ANN. art. 893(A)(1)(a) (2017) (effective November 1, 2017).

<sup>40</sup> LA. CODE CRIM. PROC. ANN. art. 893(A)(1)(a) (2017) (effective November 1, 2017).

<sup>41</sup> LA. CODE CRIM. PROC. ANN. art. 893(A)(1)(a) (2017) (effective November 1, 2017).

<sup>42</sup> LA. CODE CRIM. PROC. ANN. art. 893(B) (2017) (effective November 1, 2017).

<sup>43</sup> LA. CODE CRIM. PROC. ANN. art. 893(B)(1)(b) (2017) (effective November 1, 2017).

<sup>44</sup> LA. CODE CRIM. PROC. ANN. art. 893(B)(1) (2017) (effective November 1, 2017).

<sup>45</sup> LA. CODE CRIM. PROC. ANN. art. 893(D) (2017).

<sup>46</sup> LA. CODE CRIM. PROC. ANN. art. 893(E)(1)(a) (2017).

<sup>47</sup> LA. CODE CRIM. PROC. ANN. art. 893(E)(1)(a) (2017).

<sup>48</sup> LA. CODE CRIM. PROC. ANN. art. 893(E)(1)(b) (2017); LA. STAT. ANN. § 14:2 (2017).

<sup>49</sup> LA. CODE CRIM. PROC. ANN. art. 893(E)(2) (2017).

<sup>50</sup> LA. CODE CRIM. PROC. ANN. art. 893 (2017).

<sup>51</sup> LA. CODE CRIM. PROC. ANN. art. 893 (2017).

<sup>52</sup> LA. STAT. ANN. § 15:571.44 (2017).

all other requirements of your court-ordered probation, your conviction may be set aside and the prosecution dismissed.<sup>53</sup>

You have the right to be represented by counsel at any court hearing relating to the job intervention program.<sup>54</sup> You will be represented by counsel during the negotiations to decide whether you are eligible to participate in the program. You will also be represented by your counsel at the time of the execution (a hearing where the court approves of the terms agreed upon by both parties) of the probation agreement, and at any hearing that will revoke, or take away, your probation and discharge you from the program, unless the court finds and the record shows that you have waived your right to counsel.<sup>55</sup>

In order to be eligible for a job intervention program, the crime you were charged for cannot be a crime of violence, domestic abuse, simple burglary of an inhabited dwelling, aggravated kidnapping of a child, or operating a vehicle while intoxicated that resulted in death.<sup>56</sup> You cannot have other criminal proceedings accusing you of a crime of violence pending against you.<sup>57</sup> The district attorney may propose that you be screened for eligibility as a participant in the job intervention program to the court if you are a first time offender, and your sentence may be suspended.<sup>58</sup> When the court receives the proposal, the court will advise you that you may be eligible for a court-authorized job intervention program.<sup>59</sup>

#### 4. Substance Abuse Probation Program

The substance abuse probation program provides substance abuse counseling and treatment for defendants sentenced to substance abuse probation.<sup>60</sup> Under this option, the court will suspend your sentence and order you to participate in a substance abuse probation program.<sup>61</sup> The district attorney must agree that you should be sentenced to a substance abuse probation program and the court must find all of the following:

- 1) You suffer from an addiction to a controlled dangerous substance;
- 2) You are likely to respond positively to the substance abuse probation program;
- 3) The available substance abuse probation program is appropriate to meet your needs; and
- 4) You do not pose a threat to the community, and it is in the best interests of justice to provide you with treatment as opposed to imprisonment or other sanctions.<sup>62</sup>

If you violate any condition of your probation: you, the treatment supervisor, the probation officer, the district attorney, or the court, may file a motion to revoke your probation. If you would benefit from an adjustment to the probation or treatment program, you, the treatment supervisor, the probation officer, the district attorney, or the court, may file a motion to modify the terms and conditions of the probation.<sup>63</sup>

### D. EARLY RELEASE

#### 1. Good Time

If you have been convicted of a felony, you may be able to shorten your sentence through “good time.” You can earn good time through good behavior and performance of work or self-improvement activities, or both.<sup>64</sup>

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<sup>53</sup> LA. STAT. ANN. § 15:571.44 (2017).

<sup>54</sup> LA. STAT. ANN. § 15:571.44 (2017).

<sup>55</sup> LA. STAT. ANN. § 15:571.44 (2017).

<sup>56</sup> LA. STAT. ANN. § 15:571.44 (2017).

<sup>57</sup> LA. STAT. ANN. § 15:571.44 (2017).

<sup>58</sup> LA. STAT. ANN. § 15:571.43 (2017).

<sup>59</sup> LA. STAT. ANN. § 15:571.43 (2017).

<sup>60</sup> LA. CODE CRIM. PROC. ANN. art. 903 (2017).

<sup>61</sup> LA. CODE CRIM. PROC. ANN. art. 903.2 (2017).

<sup>62</sup> LA. CODE CRIM. PROC. ANN. art. 903.2 (2017).

<sup>63</sup> LA. CODE CRIM. PROC. ANN. art. 903.2 (2017).

<sup>64</sup> LA. REV. STAT. ANN. § 15:571.3 (2017).

### a. Earning Good Time

Every prisoner is eligible to earn good time, unless you have been convicted for a sexual offense or convicted for a second-time crime of violence.<sup>65</sup> If you have been convicted of a misdemeanor, good time is available to you only if you have been sentenced to a parish prison for one year or more.<sup>66</sup>

Your sentence will be reduced at a rate of thirty days for every thirty days that you were in custody, or held in prison.<sup>67</sup> For example, if you spent thirty days in prison, you could earn thirty days of good time credit and be released thirty days early. If you were convicted for the first time of a crime of violence, your sentence will be shortened at the rate of three days for every seventeen days in actual custody, including time spent in custody with good behavior before being sentenced for the particular sentence.<sup>68</sup> This means that if you were convicted for the first time of a crime of violence and you were in prison for thirty-four days, you could only earn six days of good time.

You can also earn good time instead of incentive wages if you have been convicted of a felony.<sup>69</sup> If you are serving a life sentence, the reduction will be applied if and when your life sentence is reduced to a certain number of years. The amount of reduction received instead of incentive wages will be one and a half days for every day in custody.<sup>70</sup> This means that if you are receiving good time instead of incentive wages, your sentence can be reduced by ninety days if you spent sixty days in prison. You cannot earn good time under this rule if you are serving a sentence for the conviction of a sex crime, or a crime of violence.<sup>71</sup>

The secretary of the Department of Public Safety and Corrections decides whether you have earned your good time credit.<sup>72</sup> The secretary is the only one who exercises freedom in assessment of good time credit. The secretary also establishes rules and procedures and determines whether you have earned good time.<sup>73</sup> The trial judge has no freedom to decide your eligibility for good time credit.<sup>74</sup>

### b. Losing Good Time

There are several ways in which you can forfeit, or lose, your good time credit. If you escape from any correctional facility, you may lose your good time credit. If you do not report to work or do not return from work under a work program, you may lose all good time credits.<sup>75</sup> If you violate terms of your parole and are returned to the custody of the department, you will lose all good time credits.<sup>76</sup> If you commit battery (meaning use of force or violence<sup>77</sup>) against an employee, or worker of the Department of Public Safety and Corrections or any police officer, you may forfeit the good time credit already earned or credits on the portion of the sentence you were serving prior to committing the battery of the employee, up to a maximum of one hundred eighty days.<sup>78</sup>

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<sup>65</sup> LA. REV. STAT. ANN. § 15:571.3 (2017).

<sup>66</sup> Op. Atty. Gen., No. 77-1236, April 24, 1978.

<sup>67</sup> LA. REV. STAT. ANN. § 15:571.3 (2017).

<sup>68</sup> LA. REV. STAT. ANN. § 15:571.3 (2017).

<sup>69</sup> LA. REV. STAT. ANN. § 15:571.3 (2017).

<sup>70</sup> LA. REV. STAT. ANN. § 15:571.3 (2017).

<sup>71</sup> A crime of violence as defined in LA. STAT. ANN. § 14:2 (2017) or a sex offense as defined in LA. REV. STAT. ANN. § 15:541 (2017).

<sup>72</sup> LA. REV. STAT. ANN. § 15:571.4 (2017).

<sup>73</sup> Jackson v. Phelps, 506 So. 2d 515, 517 (La. App. 1 Cir. 1987), writ denied sub nom., State ex rel. Jackson v. Phelps, 508 So. 2d 829 (La. 1987); LA. STAT. ANN. § 15:571.4 (1987).

<sup>74</sup> Jackson v. Phelps, 506 So. 2d 515, 517 (La. App. 1st Cir. 1987), writ denied sub nom., State ex rel. Jackson v. Phelps, 508 So. 2d 829 (La. 1987).

<sup>75</sup> LA. REV. STAT. ANN. § 15:571.4 (2017).

<sup>76</sup> LA. REV. STAT. ANN. § 15:571.4 (2017).

<sup>77</sup> LA. REV. STAT. ANN. § 14:33 (2017).

<sup>78</sup> LA. REV. STAT. ANN. § 15:571.4 (2017).

If you are released because of good time (good behavior), you will be released as if you were released on parole.<sup>79</sup> Before you are released, you will be issued a certificate of parole that outlines the conditions of parole.<sup>80</sup> These conditions will be explained to you and you will have to agree to these conditions in writing before you are released.<sup>81</sup> When you are released you will be supervised in the same way and to the same extent as if you were released on parole.<sup>82</sup> The supervision will last for the remainder of the original full term of sentence that you were given by the court.<sup>83</sup> If you violate a condition given to you by the parole committee, the committee will proceed in the same manner as it would to revoke parole to determine if the release upon diminution, or reduction, of sentence should be revoked.<sup>84</sup> For more information on these procedures, *see* Chapter 21 of the *Louisiana State Supplement*.

## 2. Transitional Work Programs (TWP)

You may also shorten your sentence by participating in a Transitional Work Program, formerly known as a work release program. If you participate in the Transitional Work Program, you will be required to work at an approved job, and return to the facility when you are not working.<sup>85</sup> A full list of Transitional Work Programs and their contact information is available on the Louisiana Department of Corrections Website.<sup>86</sup> In general you will be eligible for the “Transitional Work Program” up to three years before your release date.<sup>87</sup> If you have been convicted of “forcible or second degree rape”, “aggravated arson”, “armed robbery”, “attempted murder”, “attempted armed robbery”, or sentenced as a “habitual offender”, you will be eligible to participate in a work release program only during the last six months of your term.<sup>88</sup> If you have served a minimum of fifteen years under the department or the sheriff for these crimes, you will only be eligible to participate in a work release program during the last twelve months of your term.<sup>89</sup> If you have been sentenced to imprisonment at hard labor you will be eligible at any time during your sentence.<sup>90</sup> If you have questions about your eligibility for the “Transitional Work Program”, you should write to the Warden of your facility.<sup>91</sup> If you violate the conditions defined by the department, your work release privileges may be taken away.<sup>92</sup> If you fail to report to work or return from work, it will be considered an escape, which is a separate offense. In this case, you may lose your work release privileges.<sup>93</sup>

## 3. Substance Abuse Conditional Release

The “Substance Abuse Conditional Release Program” provides substance abuse treatment and education for offenders and also links them with services in the community upon release.<sup>94</sup> In order to qualify for this program, you must be willing to participate in the program and your sentence must be for a first or second offense possession or “possession with the intent to distribute a controlled dangerous

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<sup>79</sup> LA. REV. STAT. ANN. § 15:571.5 (2017).

<sup>80</sup> LA. REV. STAT. ANN. § 15:571.5 (2017).

<sup>81</sup> LA. REV. STAT. ANN. § 15:571.5 (2017).

<sup>82</sup> LA. REV. STAT. ANN. § 15:571.5 (2017).

<sup>83</sup> LA. REV. STAT. ANN. § 15:571.5 (2017).

<sup>84</sup> LA. REV. STAT. ANN. § 15:571.5 (2017).

<sup>85</sup> Transitional Work Program, Louisiana Department of Public Safety and Corrections, *available at* <http://doc.louisiana.gov/transitional-work-program> (last visited Jan. 22, 2018).

<sup>86</sup> To access the list from the home page, click on Reentry Initiatives, and then click on Transitional Work Program. Reentry Programming, *available at* <http://doc.louisiana.gov/reentry-programming> (last visited Jan. 22, 2018).

<sup>87</sup> Frequently Asked Questions, Louisiana Department of Public Safety and Corrections, *available at* <http://doc.louisiana.gov/reentry-programming> (last visited Jan. 22, 2018).

<sup>88</sup> LA. STAT. ANN. § 15:711 (2017).

<sup>89</sup> LA. STAT. ANN. § 15:711 (2017).

<sup>90</sup> LA. STAT. ANN. § 15:1111 (2017).

<sup>91</sup> Frequently Asked Questions, Louisiana Department of Public Safety and Corrections, *available at* <http://doc.louisiana.gov/frequently-asked-questions/> (last visited Jan. 22, 2018).

<sup>92</sup> LA. STAT. ANN. § 15:1111 (2017).

<sup>93</sup> LA. STAT. ANN. § 15:1111 (2017).

<sup>94</sup> Substance Abuse Treatment, Louisiana Department of Public Safety and Corrections, *available at* <http://www.doc.la.gov/pages/reentry-initiatives/substance-abuse-treatment/> (last visited Jan. 22, 2018).

substance”.<sup>95</sup> You cannot have a conviction for a violent or sexual offense.<sup>96</sup> If you have previously been released because of this program, you are not eligible to participate again.<sup>97</sup> You must have served at least two years in actual physical custody and must currently be within one year of your projected release date.<sup>98</sup>

If you meet these criteria, you will be required to undergo an “addiction disorder assessment” and a “mental health screening” which will be reviewed by the secretary of the Department of Public Safety and Corrections. The secretary will consider this in determining your ability to participate in the treatment program.<sup>99</sup> The secretary will look at these factors:

- 1) Your involvement in any gang activity while imprisoned;
- 2) Your “custody classification”, determined by the department;
- 3) The risk of violence associated with your release; and
- 4) The availability of enough supervision resources.<sup>100</sup>

The secretary will also consider whether you have a proper release plan.<sup>101</sup> In evaluating the release plan, the secretary will consider all of the following:

- 1) Plans for rehab;
- 2) Availability of community-based “chemical dependency treatment”;
- 3) Opportunities for gainful employment; and
- 4) An approved residence plan.<sup>102</sup>

## E. COMMUTATION AND PARDONS

Commutations (changing the length of your sentence) and pardons (except automatic pardons) are both granted by the governor. Once the governor receives a recommendation from the Board of Pardons, the governor may commute your sentence, grant you a pardon, and settle (or take back) any fines or forfeitures that were given to you.<sup>103</sup> A commutation will only change the length of your sentence, but a pardon will also restore the rights that were taken away from you because of your conviction.

### 1. Commutation

A commutation granted by the governor may shorten your sentence, for example, from a life sentence to twenty years. In order to qualify for a commutation, you need a written recommendation from two of the following: (1) the lieutenant governor, (2) the attorney general, or (3) the presiding judge of the court where you were convicted.<sup>104</sup> The office of the lieutenant governor can be contacted at (225) 342-7009. You can also write to:

Office of Lieutenant Governor Billy Nungesser  
1051 North Third Street  
Baton Rouge, Louisiana 70802<sup>105</sup>

The office of the attorney general can be reached at (225) 326-6200, or you can write to:

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<sup>95</sup> LA. STAT. ANN. § 15:574.62 (2017).

<sup>96</sup> LA. STAT. ANN. § 15:574.62 (2017).

<sup>97</sup> LA. STAT. ANN. § 15:574.62 (2017).

<sup>98</sup> LA. STAT. ANN. § 15:574.62 (2017).

<sup>99</sup> LA. STAT. ANN. § 15:574.62 (2017).

<sup>100</sup> LA. STAT. ANN. § 15:574.62 (2017).

<sup>101</sup> LA. STAT. ANN. § 15:574.62 (2017).

<sup>102</sup> LA. STAT. ANN. § 15:574.62 (2017).

<sup>103</sup> LA. REV. STAT. ANN. § 15:572 (2017).

<sup>104</sup> Gaillard v. Cronvich, 269 So. 2d 231, 232 (La. 1972).

<sup>105</sup> Office of Lieutenant Governor, Contacting the Office of the Lieutenant Governor, *available at* <http://www.crt.state.la.us/lt-governor/contact/index> (last visited Jan. 22, 2018).

Office of the Attorney General, Criminal Division  
1885 North 3rd St.  
Baton Rouge, LA 70802<sup>106</sup>

Once the recommendations are received, the governor has unlimited freedom to commute your sentence.<sup>107</sup>

## 2. Pardons

A governor's pardon releases you from all the penalties of your conviction, and also restores your rights to the status of innocence (not guilty) you held before you were convicted.<sup>108</sup> If your offense has been pardoned, it may not count against you later for "multiple offender proceedings," unless it was an automatic pardon.<sup>109</sup>

If you are a first offender who has been convicted of a non-violent crime, or convicted of "aggravated battery," "second degree battery," "aggravated assault," "mingling harmful substances," "aggravated criminal damage to property," "purse snatching," "extortion," or "illegal use of weapons or dangerous instrumentalities," you will be pardoned automatically when you complete your sentence.<sup>110</sup> An automatic pardon does not require a recommendation of the Board of Pardons or any action by the governor.<sup>111</sup> These pardons do not have the same effect as a full pardon. They may be counted against you in "habitual offender proceedings."<sup>112</sup> Once you have been granted an automatic pardon, you cannot receive another automatic pardon.<sup>113</sup>

If it is not your first offense, you must apply for a pardon. You cannot apply for a pardon if you have not paid all of the court costs for your case.<sup>114</sup>

Pardons that are not automatic (for later offenses) will be screened and decided on a case-by-case basis.<sup>115</sup> If you have been convicted of a sex offense, or have been determined to be a "sexually violent predator" or a "child predator", however, you must still comply with the registration requirements.<sup>116</sup>

## 3. Application

There are no fees to apply for commutations or pardons in Louisiana.<sup>117</sup> In order to apply, you must fill out an application form that can be found on the Department of Public Safety and Corrections's website.<sup>118</sup> If you cannot access the Board's website or the form itself, call the Board at (225) 342-5421 and you can have one mailed or emailed to you.<sup>119</sup> You can also write to:

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<sup>106</sup> Office of the Attorney General, "Contact us," State of Louisiana, *available at* <https://www.ag.state.la.us/Article.aspx?articleID=28&catID=0> (last visited Jan. 22, 2018).

<sup>107</sup> Gaillard v. Cronvich, 269 So. 2d 231, 232 (La. 1972).

<sup>108</sup> Malone v. Shyne, 2006-2190, p. 6, 18 (La. 9/13/06); 937 So. 2d 343, 349, 356.

<sup>109</sup> LA. REV. STAT. ANN. § 15:572 (2017).

<sup>110</sup> LA. CONST. art. 4, § 5; LA. REV. STAT. ANN. § 15:572 (2017).

<sup>111</sup> LA. REV. STAT. ANN. § 15:572 (2017).

<sup>112</sup> LA. REV. STAT. ANN. § 15:572 (2017).

<sup>113</sup> LA. REV. STAT. ANN. § 15:572 (2017).

<sup>114</sup> LA. REV. STAT. ANN. § 15:572 (2017).

<sup>115</sup> LA. PRAC. CRIM. TRIAL PRAC. § 29:2 (4th ed. 2017).

<sup>116</sup> LA. REV. STAT. ANN. § 15:572 (2017).

<sup>117</sup> "Contact Pardons and Parole," Louisiana Department of Public Safety and Corrections, *available at* <http://www.doc.la.gov/contact-pardons-and-parole> (last visited Jan. 22, 2018).

<sup>118</sup> Clemency Form, Louisiana Department of Public Safety and Corrections, *application available at* [http://doc.louisiana.gov/assets/themes/louisiana\\_department\\_of\\_corrections/assets/images/clemency-application-form-11-4-2016-a0d27b52e8783090fce7b0046e37a51d1b774ad9432f7af8ea7117a62f9edd40.pdf](http://doc.louisiana.gov/assets/themes/louisiana_department_of_corrections/assets/images/clemency-application-form-11-4-2016-a0d27b52e8783090fce7b0046e37a51d1b774ad9432f7af8ea7117a62f9edd40.pdf) (last visited Jan. 22, 2018).

<sup>119</sup> Louisiana Department of Public Safety and Corrections, "Contact Pardons and Parole," *available at* <http://www.doc.la.gov/contact-pardons-and-parole> (last visited Jan. 22, 2018).



Louisiana Board of Pardons  
P.O. Box 94304  
Baton Rouge, LA 70804-9304

You should also include on the back of the form, a brief description of the events surrounding your offense and a brief statement about the specific reason why clemency relief is requested.<sup>120</sup> In an application for a pardon, you should explain how your conviction has hurt you and your family. For example, you could explain how your conviction has stopped you from finding good housing and a job, or how your conviction has affected your social interactions.

## F. CONCLUSION

Even after your sentence has been decided, there are still several options for you to shorten your time spent in prison. As you read this chapter, note what factors are taken into account when the court decides whether or not to grant you a reduced sentence. Learning about these options, and their rules and processes, is very important if you want to avoid spending time in prison.

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<sup>120</sup> Clemency Form, Louisiana Department of Public Safety and Corrections, *application available at* [http://doc.louisiana.gov/assets/themes/louisiana\\_department\\_of\\_corrections/assets/images/clemency-application-form-11-4-2016-a0d27b52e8783090fce7b0046e37a51d1b774ad9432f7af8ea7117a62f9edd40.pdf](http://doc.louisiana.gov/assets/themes/louisiana_department_of_corrections/assets/images/clemency-application-form-11-4-2016-a0d27b52e8783090fce7b0046e37a51d1b774ad9432f7af8ea7117a62f9edd40.pdf) (last visited Jan. 22, 2018).

## CHAPTER 21: PAROLE

### A. INTRODUCTION

“Parole” is an administrative procedure that allows convicted offenders to reside and rehabilitate under the authority of the state but without physical restraint (like jail).<sup>1</sup> In Louisiana, there is an important difference between being *eligible* for parole and being *considered* for parole.<sup>2</sup> Also, the trial court that heard your case is not involved in the process. Instead, the Department of Corrections first decides if you are *eligible* for parole. It is important to understand the difference between being eligible for parole and actually receiving parole. If you are eligible, then the Parole Board (also called “Committee on Parole”) will probably consider whether or not you actually *receive* parole and what rules govern the parole.<sup>3</sup> But, if the statute under which you were convicted addresses parole, then the Parole Board may not decide.

Therefore, before reviewing the general Louisiana parole procedures described in this Chapter, you should read the law under which you were convicted. Check to see if it describes any “built-in” rules for parole, such as conditions of parole (or total ineligibility for parole).<sup>4</sup> If you find “built-in” rules, you should follow them. If the statute doesn’t say anything about parole, then the general parole rules of the Louisiana Code apply, both for first-time and multiple-felony offenders.<sup>5</sup>

Under the Louisiana Code, there are four types of parole for which you may be eligible for consideration. These types are: (1) “regular” parole, (2) IMPACT parole, (3) medical parole, and (4) “good-time” parole. This Chapter will review how the law works for all four. You should review all four to decide which ones apply to your specific situation.

Finally, the only ways to plead for your parole are in an open parole hearing or in a written letter addressed to the Board; except for those, no one may contact any member of the Parole Board about your case.<sup>6</sup> Therefore, to avoid breaking the law, you should review and follow parole procedure before attempting to contact anyone on a Parole Board.

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<sup>1</sup> LA. REV. STAT. ANN. § 15:574.11 (2017).

<sup>2</sup> *Damone v. Whitley*, 96-0635, p. 3 (La. App. 1 Cir. 5/9/97); 694 So. 2d 1205, 1207 (parole eligibility does not guarantee parole); *Bosworth v. Whitley*, 627 So. 2d 629, 634 (La. 1993) (“[P]arole eligibility and eligibility for parole consideration are distinct and different matters.”). For more information on parole, see Chapter 36 of the main *JLM*. Although parole rules vary significantly by state, and Chapter 36 discusses parole in New York, skimming that Chapter will give you some helpful general guidance on enhancing your possibility of parole and preparing for parole Board hearings.

<sup>3</sup> *State v. Davis*, 97-0817, p. 4 (La. App. 4 Cir. 3/24/99); 735 So. 2d 708, 710 (finding that the Department of Public Safety and Corrections, not the trial court, determines eligibility for parole).

<sup>4</sup> LA. REV. STAT. § 14:64(B) (2017) (“Whoever commits the crime of armed robbery shall be imprisoned at hard labor for not less than ten years and for not more than ninety-nine years, without benefit of parole, probation, or suspension of sentence.”); LA. REV. STAT. ANN. § 15:301.1 (2017) (providing that sentences determined under criminal laws prohibiting parole will implicitly or explicitly prohibit the possibility of parole, even if the deciding Court does not specifically say so).

<sup>5</sup> *State v. Wilson*, 508 So. 2d 960, 962 (La. Ct. App. 4 Cir. 1987) (if statute under which prisoner was convicted was silent as to parole, general parole eligibility statute [LA. REV. STAT. § 15:574.4] applies). Note that from 2008 to 2010, the legislature broke up what had become a very long, confusing section 574.4 – there had been 19 subparagraphs, from A to S. Now 574.4 stops after (C). Some resources and cases will cite the former structure. Don’t worry if you can’t find 574.4(H), for example. For reference, former subparagraphs D to G are now found in 574.4.1; former subparagraphs H to N are now in 574.4.2; and former subparagraphs O to S are now in 574.4.3.

<sup>6</sup> LA. REV. STAT. § 15:574.2.1 (2017) (“Prohibited contact with committee on parole; penalties; public record.”).

## B. TYPES OF PAROLE

### 1. Regular Parole

#### a. When may you be *eligible* for “regular” (non-IMPACT) parole?

##### i. *First-time and Multiple-Offense Felony Sentences*

If any of your convictions occurred after July 1, 1982, then the rules in this paragraph apply. As of July 1, 1982, Louisiana changed its parole rules so that consideration by the Parole Board depends on whether you are a first-time offender or a repeat offender.<sup>7</sup> For first-time felony offenders, the rule is the same: you must serve one-third of your sentence before you will be considered for parole. If it's your second felony offense, you must serve one-half of your sentence before you will be considered. If it's your third or higher felony offense, you may be ineligible for consideration.<sup>8</sup> These rules apply if any of your felony offenses were committed after July 1, 1982.<sup>9</sup>

If all of your convictions occurred before July 1, 1982 and also allow for the possibility of parole, then the rules in this Paragraph may apply.<sup>10</sup> If you are a first-time offender, you will be eligible for parole consideration after serving twenty-five percent of your sentence.<sup>11</sup> If you have two felony convictions, you will be eligible for parole consideration after serving one-third of your sentence.<sup>12</sup> It is possible that if all of your convictions occurred before July 1, 1982 and you have been serving time since then, you may be eligible for parole under the “Old Man’s Parole” rule, which is described in the next Section.

##### ii. *Exceptions to First-Time and Multiple-Offense Rule*

#### (a) “Old Man’s Parole” Rules

This is what some people call the rule in 574.4(A)(2). This rule says that a prisoner is eligible for parole after serving twenty years out of a sentence of thirty years or longer, with a few restrictions. First, the prisoner must be at least 45 years old. Second, this type of parole isn't available to prisoners that have been convicted of armed robbery.<sup>13</sup> Third, the sentence has to have been for a fixed number of years—a prisoner serving a life sentence isn't eligible under this part of the law unless the sentence has been commuted to a sentence of a term of years.<sup>14</sup> If you were convicted of a life sentence that hasn't been reduced to a fixed term of years, then after 2012 your eligibility for parole will depend on the rules governed by the section in this chapter called “Life Sentences.”

#### (b) Heroin Possession

Until 2001, some crimes involving production and distribution of heroin had a mandatory life sentence without parole. However, in 2001 the Louisiana legislature changed the law: instead of

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<sup>7</sup> 1981 La. Acts, no. 762; *State v. Westmoreland*, 559 So. 2d 479, 480 (La. 1990) (“Multiple convictions entered on the same day should constitute only one offense for purposes of determining a defendant’s multiple offender status, and eligibility for suspended sentence and parole.”)

<sup>8</sup> LA. REV. STAT. § 15:574.4(A)(1) (2017).

<sup>9</sup> In other words, if any or all of the multiple felony offenses took place before July 1, 1982, the one-third rule applies. But if even one of the multiple felonies took place before that date, the rule still applies; *Thomas v. Secretary, Dep’t. of Public Safety & Corrs.*, 577 So. 2d 144, 146 (La. App. 1 Cir. 1991) (finding that the legislature did not intend that felonies used in classifying a prisoner as a third felony offender occur after the effective date of LA. REV. STAT. § 574.4(A)(1)).

<sup>10</sup> Exceptions to LA. REV. STAT. § 574(A)(1)(a) (2017) and LA. REV. STAT. § 574(A)(1)(b) (2017) are provided by LA. REV. STAT. § 574(A)(2) (2017), which provides the possibility for parole eligibility after serving 25 years and reaching the age of 45 under certain circumstances.

<sup>11</sup> LA. REV. STAT. § 574(A)(1)(b)(i) (2017).

<sup>12</sup> LA. REV. STAT. § 574(A)(1)(b)(ii) (2017).

<sup>13</sup> LA. REV. STAT. § 14.64 (2017).

<sup>14</sup> LA. REV. STAT. § 15:574.4(A)(2) (2017).

mandatory life imprisonment, it is now a range of five to fifty years.<sup>15</sup> Parole is no longer prohibited under the statute as long as the prisoner has served at least five years.<sup>16</sup> In addition, in 2009 the legislature decided that prisoners convicted under the old “life without parole” rule (before 2001) would be eligible for parole after fifteen years in prison.<sup>17</sup>

### (c) Violent Crimes

If you were convicted for a violent crime after 1997, even if it was your first or second offense, you must serve at least 85 percent of your sentence.<sup>18</sup> There are over forty crimes that the Code defines as a “crime of violence.”<sup>19</sup>

### iii. *Exclusions*

The Code also sets out a list of prisoners who are not eligible for parole, even though they meet the eligibility requirements of the “Old Man’s Rule,” “Heroin Possession,” or “Violent Crimes” exceptions:

1. Prisoners ineligible under the armed robbery statute;
2. Prisoners serving life sentences not commuted to fixed term;
3. Prisoners sentenced as serial sexual offenders; and
4. Prisoners under indictment for suspected crimes in prison.<sup>20</sup>

### (a) Life Sentences

If you don’t fall within the eligibility of the “Old Man’s Rule,” “Heroin Possession,” or “Violent Crimes” sections listed earlier, you may still be eligible for parole if you, (1) have a life sentence that has not been reduced to a term of years; and (2) meet other criteria. In 2012, Governor Bobby Jindal signed House Bill 543 into law. It provides new opportunities for parole for people who were convicted of crimes and sentenced to life at certain ages. There are four age-based categories: people who were sentenced and began life sentences when they were between 18 and 25 years old; between 25 and 35 years old; between 35 and 50 years old; and either above 50 or under 18 years old. However, if you were sentenced to life for a crime of violence or for certain sex offenses,<sup>21</sup> then you are still not eligible for parole under this exception even with the new law.<sup>22</sup>

<sup>15</sup> LA. REV. STAT. § 40:966(B)(1) (2017).

<sup>16</sup> 2001 La. Acts, No. 403.

<sup>17</sup> 2009 La. Acts, No. 533.

<sup>18</sup> *Holmes v. Louisiana Dep’t. of Public Safety & Corrs.*, 2011-2221, pp. 5–6 (La. App. 1 Cir. 6/8/12); 93 So. 3d 761, 763–764 (reaffirming that even if a crime of violence occurred before 1997, if the conviction occurred after 1997, the 85% rule applies).

<sup>19</sup> LA. REV. STAT. § 14:2(B) (2017) (Crimes include: (1) Solicitation for murder (2) First degree murder (3) Second degree murder (4) Manslaughter (5) Aggravated battery (6) Second degree battery (7) Aggravated assault (8) Mingling harmful substances (9) Aggravated rape (10) Forcible rape (11) Simple rape (12) Sexual battery (13) Second degree sexual battery (14) Intentional exposure to AIDS virus (15) Aggravated kidnapping (16) Second degree kidnapping (17) Simple kidnapping (18) Aggravated arson (19) Aggravated criminal damage to property (20) Aggravated burglary (21) Armed robbery (22) First degree robbery (23) Simple robbery (24) Purse snatching (25) Extortion (26) Assault by drive-by shooting (27) Aggravated crime against nature (28) Carjacking (29) Illegal use of weapons or dangerous instrumentalities (30) Terrorism (31) Aggravated second degree battery (32) Aggravated assault upon a peace officer with a firearm (33) Aggravated assault with a firearm (34) Armed robbery; use of firearm; additional penalty (35) Second degree robbery (36) Disarming of a peace officer (37) Stalking (38) Second degree cruelty to juveniles (39) Aggravated flight from an officer (40) Aggravated incest (41) Battery of a police officer (42) Trafficking of children for sexual purposes (43) Human trafficking (44) Home invasion.)

<sup>20</sup> LA. REV. STAT. § 15:574.4(B) (2017).

<sup>21</sup> LA. REV. STAT. § 15:541 (2017). These sex offenses include: trafficking of children for sexual purposes; incest; aggravated incest; crime against nature; crime against nature by solicitation; felony carnal knowledge of a juvenile; indecent behavior with juveniles; pornography involving juveniles; indecent behavior with juveniles; molestation of a juvenile or a person with a physical or mental disability; computer-aided solicitation of a minor; prohibited sexual conduct between an educator and a student; contributing to the delinquency of juveniles; sexual battery of the infirm; obscenity by solicitation of a person under the age of seventeen; video voyeurism; aggravated rape; forcible rape;

If you (1) did not commit a crime of violence, (2) did not commit a sex crime, (3) are not prevented from seeking parole for another reason, and (4) began your life sentence when you were between 18 and 25 years old, you may be eligible for parole if you meet all the following criteria:

- 1) You served at least twenty-five years of your sentence;
- 2) You have a low risk level designation (which is determined by a valid risk assessment authority authorized by the Department of Public Safety and Corrections);
- 3) You have not committed any disciplinary offenses in the year before your parole eligibility date;
- 4) You completed at least the required one hundred hours of pre-release programming, if the programming was available;
- 5) You completed substance abuse treatment, if required; and
- 6) You have a GED credential, a high school diploma or have completed one of the following (but only for those with a learning disability): a literacy program, an adult basic education program, or a job skills training program.<sup>23</sup>

If you did not commit a crime of violence or a sex crime, are not prevented from seeking parole for another reason, and began your life sentence when you were between 25 and 35 years old, you may be eligible for parole if you meet all the following criteria:

- 1) You have served at least twenty years of your sentence;
- 2) You have a low risk level designation (which is determined by a valid risk assessment authority authorized by the Department of Public Safety and Corrections);
- 3) You did not commit any disciplinary offenses in the year before your parole eligibility date;
- 4) You completed at least the required one hundred hours of pre-release programming, if the programming was available;
- 5) You completed substance abuse treatment, if required; and
- 6) You have a GED credential, a high school diploma or have completed one of the following (but only for those with a learning disability): a literacy program, an adult basic education program, or a job skills training program.<sup>24</sup>

If you did not commit a crime of violence or a sex crime, are not prevented from seeking parole for another reason, and you began your life sentence when you were over 50 years old, you may be eligible for parole if you meet all the following criteria:

- 1) You served at least ten years of your sentence;
- 2) You have a low risk level designation (which is determined by a valid risk assessment authority authorized by the Department of Public Safety and Corrections);
- 3) You did not commit any disciplinary offenses in the year before your parole eligibility date;
- 4) You completed at least the required one hundred hours of pre-release programming, if the programming was available;
- 5) You completed substance abuse treatment, if required; and
- 6) You have a GED credential, a high school diploma or have completed one of the following (but only for those with a learning disability): a literacy program, an adult basic education program, or a job skills training program.<sup>25</sup>

If you did not commit a crime of first or second-degree murder, and you began your life sentence when you were under 18 years old, you may be eligible for parole if you meet all the following criteria:

- 1) You served twenty-five years of your sentence;
- 2) You did not commit any disciplinary offenses in the year before your parole eligibility date;

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simple rape; sexual battery; second degree sexual battery; oral sexual battery; intentional exposure to AIDS virus; or a second conviction of voyeurism.

<sup>22</sup> LA. REV. STAT. § 15:574.4(B)(2) (2017).

<sup>23</sup> LA. REV. STAT. § 15:574.4(B)(2)(a) (2017).

<sup>24</sup> LA. REV. STAT. § 15:574.4(B)(2)(b) (2017).

<sup>25</sup> LA. REV. STAT. ANN. § 15:574.4(B)(2)(d) (2017).

- 3) You completed at least 100 hours of programming (according to R.S. § 15:827.1);
- 4) You completed substance abuse treatment, if required;
- 5) You have a GED credential, a high school diploma or have completed one of the following (but only for those with a learning disability): a literacy program, an adult basic education program, or a job skills training program;
- 6) You have a low risk level designation (determined by a valid risk assessment authority authorized by the Department of Public Safety and Corrections);
- 7) You completed a reentry program as required by the Department of Public Safety and Corrections; and
- 8) If you were convicted of aggravated rape, you will be designated a sex offender and upon release must follow all sex offender registration and notification provisions required by law.<sup>26</sup>

b. Procedures<sup>27</sup>

The Parole Board has seven members. The Governor appoints all of the members.<sup>28</sup> If you are *eligible* for parole, the Board has much freedom regarding whether and when you actually receive a hearing.<sup>29</sup> In making its decision, the Board will review a range of factors, including the type of offense, the specifics of your offense, your prison records, the pre-sentence investigation report, recommendations of the chief probation and parole officers, and any information or data gathered by the Board's staff.<sup>30</sup> The Board will consider these and may determine that you are not *eligible* for parole. If the Board decides that you are eligible for parole, it will set a date for a hearing to *consider your parole outcome*. You will have the opportunity to meet with the Board shortly before your date of eligibility and the hearing.<sup>31</sup> The victim of your crime can also appear before the Board if they choose.<sup>32</sup>

You will receive a decision about your parole outcome within thirty days of your hearing.<sup>33</sup> If you are granted parole, you will receive a “certificate of parole” that lists all the conditions of your parole. These conditions must be explained to you, and you must agree to them in writing.<sup>34</sup> The Board will set the date of your release, but it cannot be later than six months after the hearing or the most recent reconsideration of your case.<sup>35</sup>

c. Parole Rules for Sex Offenders<sup>36</sup>

i. *Consideration of eligibility / Parole hearing*

When the Board decides whether or not to grant a parole hearing to someone convicted of a sexual offense, it considers other factors, too.<sup>37</sup> If no other provisions of the law or other rules disqualify the prisoner from parole, the Board has to consider any available clinical reports, disease testing results, and

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<sup>26</sup> LA. REV. STAT. ANN. § 15:574.4(D)(1) (2017).

<sup>27</sup> For more information on parole procedures, see Part C(1) of this Chapter.

<sup>28</sup> LA. REV. STAT. ANN. § 15:574.2(A)(2) (2017).

<sup>29</sup> *Merit v. Lynn*, 848 F. Supp. 1266, 1269 (W.D. La. 1994) (discretionary parole eligibility does not automatically give rise to “legitimate expectation” of release); *Sinclair v. Kennedy*, 96-1510, p. (La. App. 1 Cir. 9/19/97); 701 So. 2d 457, 462 (The Parole Board has full discretion when passing on applications for early release.).

<sup>30</sup> LA. REV. STAT. ANN. § 15:574.4(C)(1) (2017).

<sup>31</sup> LA. REV. STAT. ANN. § 15:574.4.1(A)(1) (2017).

<sup>32</sup> LA. REV. STAT. ANN. § 15:574.4.1(A)(2) (2017).

<sup>33</sup> LA. REV. STAT. ANN. § 15:574.4.1(B) (2017).

<sup>34</sup> LA. REV. STAT. ANN. § 15:574.4.1(C) (2017). The Board *must* require that you refrain from criminal conduct. It *may* require a broad range of other conditions, including (just for example) appearances at the parole office at specified times; limitations on travel; written reports by the parolee; avoidance of certain habits, places, or types of people; work at a lawful occupation and/or community service; submission to certain examinations or treatments; waiver of warrant requirements for searches of the parolee's person or property, and more. See LA. REV. STAT. ANN. § 15:574.4.2(A) (2017).

<sup>35</sup> LA. REV. STAT. ANN. § 15:574.4.1(D)(1) (2017).

<sup>36</sup> For more information on special considerations for sex offenders, see Chapter 17 of this *Louisiana State Supplement*.

<sup>37</sup> “Sex offense” is defined in LA. REV. STAT. ANN. § 15:541(24)(a) (2017).

recommendations by mental health professionals.<sup>38</sup> The Board will consider these reports and other information to determine whether the prisoner has successfully completed the sex offender program. The Board must also consider whether there is a chance that the prisoner will be a danger to society.<sup>39</sup> The Board must send written notice of the date and time of the hearing to the victim (or the victim's parent or guardian) unless they have notified the Board in advance that they do not want to receive this notice. The victim (or parent/guardian) must have a reasonable opportunity to attend and speak at the hearing.<sup>40</sup> The parole rules for sex offenders apply instead of any otherwise applicable parole rules for "intensive parole supervision"<sup>41</sup> or any "good time" sentence reductions.<sup>42</sup>

ii. *Post-parole*

The Board can set a broad range of conditions for parole, but specific conditions apply to certain sexual offenders. If you meet the criteria relating to sexual offenses in the statute, the Board will order you to register as a sex offender.<sup>43</sup> You will have to pay certain annual fees (currently \$60/year) to cover the costs of registration, unless you qualify as "indigent."<sup>44</sup> The registration requirements are mandatory. The requirements can only be waived by the court if the district attorney agrees and if you satisfy certain other criteria (including maximum age differences between the victim and the offender).<sup>45</sup>

You also will have to notify various personnel in your areas of residence, work, and/or education. You will have to give extensive documentation and other information to these authorities, all of which are explained in detail in the Code.<sup>46</sup> For example, you will have to:

- 1) Give notice of your crime, your name, your home address, a description of your physical appearance, and a photograph or copy to all the following:
  - a) At least one person in every home or business within a one-mile radius in a rural area and a three-tenths of a mile radius in an urban or suburban area of the address where you will live;<sup>47</sup>
  - b) The superintendent of the school district where you will live. Notice must include two recent photographs of you;<sup>48</sup>
  - c) The lessor, landlord, or owner of the place where you will live;<sup>49</sup> and
  - d) The superintendent of any park, playground, or recreation districts near the area where you will live. Notice must include two recent photographs of you.<sup>50</sup>
- 2) Give any other notice required by the court that makes you register as an offender. Notice can include marking signs, handbills, bumper stickers, or clothing.<sup>51</sup>
- 3) Post the number of your physical address in an obvious place on the outside of your home. The number must be shown clearly and must be visible and readable by an ordinary person approaching your home during the day.<sup>52</sup>

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<sup>38</sup> LA. REV. STAT. ANN. § 15:574.4(C)(2)(a) (2017).

<sup>39</sup> LA. REV. STAT. ANN. § 15:574.4(C)(2)(a) (2017).

<sup>40</sup> LA. REV. STAT. ANN. § 15:574.4.3(A) (2017).

<sup>41</sup> LA. REV. STAT. ANN. § 15:574.4.3(B) (2017).

<sup>42</sup> LA. REV. STAT. ANN. § 15:574.4.3(C) (2017). For more information on "good time" reductions, see Part B(4) of this Chapter.

<sup>43</sup> The notification requirement is set out in LA. REV. STAT. ANN. § 15:574.4.3(D)(1) (2017). The range of parolees that have to provide notification goes beyond "sex offenders" to include "sexually violent predators" and "child predators." See LA. REV. STAT. ANN. § 15:542 (2017).

<sup>44</sup> LA. REV. STAT. ANN. § 15:542(D) (2017).

<sup>45</sup> LA. REV. STAT. ANN. § 15:542(F)(2) (2017).

<sup>46</sup> LA. REV. STAT. ANN. § 15:542(A) (2017).

<sup>47</sup> LA. REV. STAT. ANN. § 15:542.1(A)(1)(a) (2017).

<sup>48</sup> LA. REV. STAT. ANN. § 15:542.1(A)(1)(b)(i) (2017).

<sup>49</sup> LA. REV. STAT. ANN. § 15:542.1(A)(1)(c) (2017).

<sup>50</sup> LA. REV. STAT. ANN. § 15:542.1(A)(1)(d) (2017).

<sup>51</sup> LA. REV. STAT. ANN. § 15:542.1(A)(3) (2017).

<sup>52</sup> LA. REV. STAT. ANN. § 15:542.1(A)(5) (2017).

- 4) If you wish to use the internet to connect with other people through networking (for example, on a website like Facebook), you will have to announce on your profile that you are a registered sex offender.<sup>53</sup>

The above list is not a full list of requirements. You should consult the Code and read Chapter 17 of the *Louisiana State Supplement* to understand all the requirements that you will have to complete if you are granted parole after a conviction for a sex offense.

## 2. Medical Parole

### a. Eligibility

You may be considered for medical parole if the Department of Public Safety and Corrections refers you.<sup>54</sup> To be eligible for consideration you must be “permanently incapacitated” or “terminally ill”<sup>55</sup> because of a current medical or physical condition.<sup>56</sup> “Permanently incapacitated” means that your medical or physical condition is so severe and permanent that you couldn’t be a danger to yourself or society. “Terminally ill” means that you are irreversibly ill, and also so sick that you couldn’t be a danger to yourself or others.<sup>57</sup>

Even if you meet those criteria, though, you won’t be eligible for medical parole if you’re serving time for first or second-degree murder.<sup>58</sup>

### b. Procedure

The Department of Safety and Public Corrections recommends eligible prisoners to the Board of Parole for consideration. The Board then makes the final decision.<sup>59</sup> The Board might need more medical evidence or examinations.<sup>60</sup> Just like regular parole hearings, these hearings are public and are scheduled with both the prisoner’s and the Board’s convenience in mind.<sup>61</sup>

### c. Benefit

If the Board grants parole, the term of release is for the rest of your sentence. Your parole might be revoked though in two cases: (1) if you recover to a point where you wouldn’t meet the criteria for eligibility, or (2) if you violate any added conditions of parole set by the Board.<sup>62</sup>

### i. Recovery

At the time of your release, the Board will set up a schedule of periodic medical evaluations.<sup>63</sup> If these evaluations show that you’re not “permanently incapacitated” or “terminally ill” under the definitions described above, then the Board *may* order that you be returned to the custody of the Department of Public Safety and Corrections. You would then wait for a hearing by the Board to make a final decision about whether your medical parole will be reversed. If it is reversed, then you continue the remaining time of your sentence. You will get credit though for the time you were on medical parole.<sup>64</sup> So

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<sup>53</sup> LA. REV. STAT. ANN. § 15:542.1(D)(1) (2017).

<sup>54</sup> LA. REV. STAT. ANN. § 15:574.20(A) (2017).

<sup>55</sup> LA. REV. STAT. ANN. § 15:574.20(B)(1)(a), (b) (2017).

<sup>56</sup> LA. REV. STAT. ANN. § 15:574.20(B)(1) (2017).

<sup>57</sup> LA. REV. STAT. ANN. § 15:574.20 B(1)(a), (b) (2017).

<sup>58</sup> LA. REV. STAT. ANN. § 14:30(C), 14:30.1(B) (2017).

<sup>59</sup> LA. REV. STAT. ANN. § 15:574.20(A)(1), (C) (2017). For specific details on Medical Release / Parole laid out by the Department of Public Safety and Corrections, see Department Regulation No. B-06-001 and Department Regulation No. C-03-004.

<sup>60</sup> LA. REV. STAT. ANN. § 15:574.20 (C) (2014); see also LA. ADMIN. CODE tit. 22 § 307(D) (2017).

<sup>61</sup> LA. ADMIN. CODE tit. 22 § 307(D) (2017).

<sup>62</sup> LA. REV. STAT. ANN. § 15:574.20 (E) (2017).

<sup>63</sup> LA. ADMIN. CODE tit. 22 § 307(E) (2017).

<sup>64</sup> LA. REV. STAT. ANN. § 15:574.20 (F) (2017).



if, for example, you have five years left on your sentence when you receive medical parole, you are out for one year and get better, and the Board reverses your parole, you will have four years left in your sentence, not five.

Also, if your parole is reversed because your illness or condition has gotten better, and you meet the other criteria, you can still be considered for parole under the “time-served” provisions of R.S. 15:574.4.<sup>65</sup>

ii. *Violation of Conditions of Medical Parole*

The Board can set any other conditions of your parole on the time of your medical release. If you violate any of these conditions, your medical parole can be reversed by the Board.<sup>66</sup>

d. Temporary Release by the Secretary of Corrections for Limited Purposes<sup>67</sup>

In addition to the formal medical parole procedures described above, in 2008 the Legislature gave the Secretary of Corrections direct, “fast-track” authority to give temporary release of certain very ill or disabled prisoners for hospice-type or other medical care.<sup>68</sup> This sort of release applies to *terminally* ill prisoners who either (1) aren’t expected to live for more than sixty days, or (2) cannot leave a hospital or nursing home because of a condition that prevents any mobility (like a coma or use of a respirator). However, prisoners awaiting execution aren’t eligible for this type of release.<sup>69</sup>

With more exceptions for certain offenders,<sup>70</sup> the Secretary can also approve the temporary release of a *non-terminally ill* prisoner if the prisoner needs to stay in a health facility because of condition that prevents any mobility.<sup>71</sup>

4. **Diminution of Sentence**

a. What is Diminution of Sentence?

Diminution of sentence is also known as “good time.” “Good time” refers to the credit that you can earn through good behavior—credit that is then used to reduce the length of your sentence.

b. Who is Eligible for Diminution of Sentence?

Good time is available to most prisoners. However, you are not eligible if you have been convicted of a violent offense<sup>72</sup> for the second time. You are also not eligible if your sentencing court specifically barred you from qualifying for “good time” release.<sup>73</sup> On the other hand, even if you are sentenced to life imprisonment, you may still earn good time. In that case, good time can be used to shorten your sentence if your life sentence is ever commuted to a specific number of years.<sup>74</sup> At that point, good time would

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<sup>65</sup> See Part B(1)(a)(i) of this Chapter.

<sup>66</sup> LA. REV. STAT. ANN. § 15:574.20 (F) (2017).

<sup>67</sup> For more information on temporary release, see Chapter 19 of this *Louisiana State Supplement*.

<sup>68</sup> LA. REV. STAT. ANN. § 15:833.2 (2017).

<sup>69</sup> LA. REV. STAT. ANN. § 15:833.2(A) (2017).

<sup>70</sup> Categories of offenders barred from temporary release under this rule include those convicted of: first-degree murder; second-degree murder; attempted murder; aggravated rape; attempted aggravated rape; forcible rape; aggravated kidnapping; aggravated arson; armed robbery; attempted armed robbery; producing, manufacturing, distributing, or dispensing or possession with intent to produce, manufacture, distribute, or dispense a controlled Schedule I or II dangerous substance; or any inmate sentenced as a habitual offender. LA. REV. STAT. § 15:833.2(B) (2017).

<sup>71</sup> LA. REV. STAT. ANN. § 15:833.2(B) (2017).

<sup>72</sup> Crimes of violence are defined at LA. REV. STAT. § 14:2 (2017). They are also listed in footnote 19 of this Chapter.

<sup>73</sup> LA. REV. STAT. ANN. § 15: 571.3(A)(1) (2017).

<sup>74</sup> LA. REV. STAT. ANN. § 15: 571.3(B)(1)(a) (2017).

shorten your sentence of a fixed term of years. However, if you are serving a life sentence related to a sexual offense or to a crime of violence, then you will not be eligible to earn good time.<sup>75</sup>

c. How is Good Time Earned?

You may earn a reduction of sentence through good behavior, dedicated performance of work, and participating in self-improvement activities.<sup>76</sup>

d. At What Rate Will Good Time Diminish My Sentence?

For most prisoners, the sentence is shortened by thirty days for every thirty days served in actual custody. This includes time spent in custody with good behavior before sentencing.<sup>77</sup>

However, prisoners who are first-time offenders convicted of a crime of violence earn good time at a slower rate. Instead of a thirty-day reduction for every thirty days in custody, the sentence decreases by three days for every seventeen days spent in actual custody.<sup>78</sup> If you are serving a life sentence, the rate of calculation is thirteen days diminished for every seven days in custody with good behavior.<sup>79</sup>

Ultimately, no matter what rate is applied to your sentence, you will not be able to earn more than thirty-five days of good time during any one month (or thirty-day period).

e. How is Good Time Determined?

The Sheriff of the parish in which you were convicted is the only person who determines when you have earned good time. He applies the rules set out in the statute to determine when and how much good time you have earned.<sup>80</sup> In some cases, your correctional facility will not be operated by a sheriff. If that is the case, the superintendent of your facility will decide whether you earned good time.<sup>81</sup>

## 5. Work Release

a. What is Work Release?

Work release is a program that allows eligible prisoners to enter a work release facility. While at work release facilities, prisoners will work at an approved job *outside* of the prison, and return to the work release facility.<sup>82</sup> The goal is to assist prisoners with the transition back to the workforce.<sup>83</sup> The local sheriff designs and operates work release programs. In the case that a sheriff does not oversee the area in which a prison or jail exists, the prison or jail superintendent will design and run the work release program.<sup>84</sup> The state is bound by law to design, provide, and manage work release programs.<sup>85</sup>

b. How Does Work Release Work?

If you are approved for a work release program, you will report to your approved job and spend the rest of your time in the structured environment of the work release facility. Failure to show up at work is treated like an escape from incarceration.<sup>86</sup> Approved jobs may include placements at universities,

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<sup>75</sup> LA. REV. STAT. ANN. § 15: 571.3(B)(1)(b) (2017).

<sup>76</sup> LA. REV. STAT. ANN. § 15:571.3(A)(1) (2017).

<sup>77</sup> LA. REV. STAT. ANN. § 15: 571.3(A)(1) (2017).

<sup>78</sup> LA. REV. STAT. ANN. § 15: 571.3(A)(1) (2017).

<sup>79</sup> LA. REV. STAT. ANN. § 15:571.3(B)(1)(a) (2017).

<sup>80</sup> LA. REV. STAT. ANN. § 15: 571.3(A)(2) (2017).

<sup>81</sup> LA. REV. STAT. ANN. § 15: 571.3(A)(3) (2017).

<sup>82</sup> Louisiana Department of Corrections, Reentry Initiatives, Work Release (2010).

<sup>83</sup> LA. REV. STAT. ANN. § 15:1199.5(B) (2007).

<sup>84</sup> LA. REV. STAT. ANN. § 15:711(A) (2017).

<sup>85</sup> LA. REV. STAT. ANN. § 15:1199.6 (2007).

<sup>86</sup> LA. REV. STAT. ANN. § 15:1111(B) (2017).

colleges, trade schools, vocational programs, or technical schools.<sup>87</sup> These placements are chosen to increase your skill set and make it easier for you to find a job and transition back into society once you are released from jail.<sup>88</sup>

In order to be placed in the work release program, the Department of Corrections must be able to find housing space for you in an approved work release facility. You must also have accepted an approved job placement near the work release facility.<sup>89</sup>

While you are in the work release facility, you will be responsible for paying the cost of your room, board, clothing, travel to and from work, and other necessary expenses.<sup>90</sup> However, the total amount of these deductions cannot be more than seventy percent of your wages.<sup>91</sup> The remainder of your wages will be collected by the work release facility and will be deposited into a public bank account established on your behalf and will be available to you when you are released.<sup>92</sup> You will be paid the same wage that non-prisoner employees receive.<sup>93</sup>

### c. Who is Eligible for Work Release?

You will not be eligible for work release if your sentence does not allow it, even if you meet other eligibility standards.<sup>94</sup> If you were sentenced for (1) certain sex offenses;<sup>95</sup> (2) certain crimes of violence;<sup>96</sup> or (3) if you are a habitual offender,<sup>97</sup> then you may not be able to participate in some types of work release programs.<sup>98</sup>

However, if you were convicted of forcible rape, aggravated arson, armed robbery, attempted murder, attempted armed robbery, or were sentenced as a habitual offender and are not otherwise barred from work release by your sentence, you will be eligible to participate in a work release program during the last six months of your sentence. But, if you have served for at least fifteen years for any of the crimes

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<sup>87</sup> LA. REV. STAT. ANN. § 15:1111(B) (2017).

<sup>88</sup> LA. REV. STAT. ANN. § 15:1199.5 (2017).

<sup>89</sup> LA. REV. STAT. ANN. § 15:1111(C) (2017).

<sup>90</sup> LA. REV. STAT. ANN. § 15:1111(D) (2017).

<sup>91</sup> LA. REV. STAT. ANN. § 15:1111(H) (2017).

<sup>92</sup> LA. REV. STAT. ANN. § 15:1111(E) (2017).

<sup>93</sup> LA. REV. STAT. ANN. § 15:1111(G) (2017).

<sup>94</sup> LA. REV. STAT. ANN. § 15:711(B) (2017).

<sup>95</sup> These sex offenses include: trafficking of children for sexual purposes; incest; aggravated incest; crime against nature; crime against nature by solicitation; felony carnal knowledge of a juvenile; indecent behavior with juveniles; pornography involving juveniles; indecent behavior with juveniles; molestation of a juvenile or a person with a physical or mental disability; computer-aided solicitation of a minor; prohibited sexual conduct between an educator and a student; contributing to the delinquency of juveniles; sexual battery of the infirm; obscenity by solicitation of a person under the age of seventeen; video voyeurism; aggravated rape; forcible rape; simple rape; sexual battery; second degree sexual battery; oral sexual battery; intentional exposure to AIDS virus; or a second conviction of voyeurism. LA. REV. STAT. § 15.541 (2017).

<sup>96</sup> Crimes include: (1) Solicitation for murder (2) First degree murder (3) Second degree murder (4) Manslaughter (5) Aggravated battery (6) Second degree battery (7) Aggravated assault (9) Aggravated rape (10) Forcible rape (11) Simple rape (12) Sexual battery (13) Second degree sexual battery (14) Intentional exposure to AIDS virus (15) Aggravated kidnapping (16) Second degree kidnapping (17) Simple kidnapping (18) Aggravated arson (19) Aggravated criminal damage to property (20) Aggravated burglary (21) Armed robbery (22) First degree robbery (23) Simple robbery (24) Purse snatching (26) Assault by drive-by shooting (27) Aggravated crime against nature (28) Carjacking (30) Terrorism (31) Aggravated second degree battery (32) Aggravated assault upon a peace officer (33) Aggravated assault with a firearm (34) Armed robbery; use of firearm; additional penalty (35) Second degree robbery (36) Disarming of a peace officer (37) Stalking (38) Second degree cruelty to juveniles (39) Aggravated flight from an officer (41) Battery of a police officer (42) Trafficking of children for sexual purposes (43) Human trafficking (44) Home invasion, (45) Domestic abuse aggravated assault, (46) Vehicular homicide, when the operator's blood alcohol concentration exceeds .20 percent by weight based on grams of alcohol per one hundred cubic centimeters of blood, (47) Aggravated assault upon a dating partner. LA. REV. STAT. § 14:2(B) (2017).

<sup>97</sup> Sentencing implications for habitual offenders are explained in LA. REV. STAT. § 15:529.1 (2017).

<sup>98</sup> LA. REV. STAT. ANN. § 15:1199.7(C) (2017).

listed in this paragraph, then you will be eligible to participate in a work release program during the last year of your sentence, or possibly earlier.<sup>99</sup>

If you were convicted of producing, manufacturing, distributing, or dispensing, or possession with intent to produce, manufacture, distribute, or dispense a controlled dangerous substance listed in R.S. 40:964, you will be eligible to participate in a work release program if you have met the other eligibility standards for work release as defined by the Department of Corrections or the state.<sup>100</sup>

While you may be eligible for work release under the guidelines described in this section, ultimately the local sheriff or superintendent must determine which inmates are eligible for work release.<sup>101</sup>

#### d. Workforce Development Work Release

In 2008, the Legislature passed the “Reentry Advisory Council and Offender Rehabilitation Workforce Development Act” to encourage the development of skilled craftsmen among the prisoner populations. This is a special type of work release for prisoners who are already certified skilled workers in a particular field, or who have undergone a Department of Public Safety and Corrections “Workforce Development” program.<sup>102</sup> To be eligible for this program, you must first meet all of the requirements for regular work release. However, there are some differences between regular work release and Workforce Development work release. For example, although some sexual offenders, violent offenders, and habitual offenders can participate in regular work release toward the end of their terms, they are completely ineligible for Workforce Development work release.<sup>103</sup>

If you participate in the program, you will gain the benefits of training and working as a skilled craftsman. Most of the terms and conditions of your employment while in the program will match those of regular work release. However, under the Workforce Development program you are allowed to spend part of your wages on tuition, books, certification fees, and similar costs of certification.<sup>104</sup> The purpose of the legislation is to meet Louisiana’s pressing need for skilled labor, while at the same time helping you gain the occupational skills you’ll need to support your family and contribute to the community.<sup>105</sup>

### C. RULES OF PAROLE

#### 1. Parole Decisions

##### a. Applications for Rehearings

If the Board decides to deny parole, then you may be able to apply for a rehearing. The rules for rehearings are found in the Louisiana Administrative Code, Section 22, Part XI, Chapter 7, § 705.<sup>106</sup> These rules are described below.

For all applications for rehearings, you must submit a Reapplication for Parole Form.<sup>107</sup> Either you or your attorney may submit this form.<sup>108</sup> If you have been permanently assigned to maximum custody status for disciplinary adjustment reasons, then you will NOT be able to apply for a rehearing until at least six months after you have been released from such status.<sup>109</sup>

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<sup>99</sup> LA. REV. STAT. ANN. § 15:1111(I)(1) (2017).

<sup>100</sup> LA. REV. STAT. ANN. § 15:1111(I)(2) (2017).

<sup>101</sup> LA. REV. STAT. ANN. § 15:711(B) (2017).

<sup>102</sup> LA. REV. STAT. § 15:1199.9(A) (2017).

<sup>103</sup> LA. REV. STAT. § 15:1199.7(C) (2017).

<sup>104</sup> LA. REV. STAT. §§ 15:1199.9 (E)(3)–(5) (2017).

<sup>105</sup> LA. REV. STAT. § 15:1199.2 (B), (D) (2017).

<sup>106</sup> LA. ADMIN. CODE tit. 22 § 705 (2017).

<sup>107</sup> LA. ADMIN. CODE tit. 22 § 705(A) (2017).

<sup>108</sup> LA. ADMIN. CODE tit. 22 § 705(B) (2017).

<sup>109</sup> LA. ADMIN. CODE tit. 22 §§ 705(C)(1)–(2) (2017).

i. *Nonviolent crimes: every six months*

If your conviction was for a nonviolent crime, you may reapply every six months from the Board's original denial of parole (unless your reapplication is otherwise restricted by some other rule).<sup>110</sup>

ii. *Violent crimes: one year later, then every two years*<sup>111</sup>

If your conviction was for a *crime of violence* (as defined in R.S. 14:2<sup>112</sup>, or as set forth by the court at the time of sentencing), or for a crime against persons (as defined in R.S. 14:29–14:47<sup>113</sup>), you may

<sup>110</sup> LA. ADMIN. CODE tit. 22 § 705(C)(3) (2017).

<sup>111</sup> LA. ADMIN. CODE tit. 22 § 705(C)(3) (2017).

<sup>112</sup> LA. REV. STAT. ANN. §§ 14:2 (B)(1)–(47) (2007). In this Code, “crime of violence” means an offense that has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, and that, by its very nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense or an offense that involves the possession or use of a dangerous weapon. Crimes include: (1) Solicitation for murder (2) First degree murder (3) Second degree murder (4) Manslaughter (5) Aggravated battery (6) Second degree battery (7) Aggravated assault (8) Repealed by Acts 2017, No. 281, § 3 (9) Aggravated rape (10) Forcible rape (11) Simple rape (12) Sexual battery (13) Second degree sexual battery (14) Intentional exposure to AIDS virus (15) Aggravated kidnapping (16) Second degree kidnapping (17) Simple kidnapping (18) Aggravated arson (19) Aggravated criminal damage to property (20) Aggravated burglary (21) Armed robbery (22) First degree robbery (23) Simple robbery (24) Purse snatching (25) Repealed by Acts 2017, No. 281, § 3 (26) Assault by drive-by shooting (27) Aggravated crime against nature (28) Carjacking (29) Repealed by Acts 2017, No. 281, § 3 (30) Terrorism (31) Aggravated second degree battery (32) Aggravated assault upon a peace officer with a firearm (33) Aggravated assault with a firearm (34) Armed robbery; use of firearm; additional penalty (35) Second degree robbery (36) Disarming of a peace officer (37) Stalking (38) Second degree cruelty to juveniles (39) Aggravated flight from an officer (40) Repealed by Acts 2014, No. 602, § 7, eff. June 12, 2014 (41) Battery of a police officer (42) Trafficking of children for sexual purposes (43) Human trafficking (44) Home invasion (45) Domestic abuse aggravated assault (46) Vehicular homicide, when the operator's blood alcohol concentration exceeds 0.20 percent by weight based on grams of alcohol per one hundred cubic centimeters of blood (47) Aggravated assault upon a dating partner.

<sup>113</sup> LA. REV. STAT. ANN. §§ 14:29–14:50.2 (2017). In this Code, “person” means includes a human being from the moment of fertilization and implantation and also includes a body of persons, whether incorporated or not. Crimes against persons include: § 14:29 (Homicide), § 14:30 (First degree murder), § 14:30.1 (Second degree murder), § 14:31 (Manslaughter), § 14:32 (Negligent homicide), § 14:32.1 (Vehicular homicide), § 14:32.5 (Feticide), § 14:32.6 (First degree feticide), § 14:32.7 (Second degree feticide), § 14:32.8 (Third degree feticide), § 14:32.9 (Criminal abortion) § 14:32.9.1 (Aggravated criminal abortion by dismemberment) § 14:32.10 (Partial birth abortion), § 14:32.11 (Partial birth abortion), § 14:32.12 (Criminal assistance to suicide), § 14:33 (Battery defined), § 14:34 (Aggravated battery), § 14:34.1 (Second degree battery), § 14:34.2 (Battery of a police officer), § 14:34.3 (Battery of a school teacher), § 14:34.4 (Battery of a school or recreation athletic contest official), § 14:34.5 (Battery of a correctional facility employee), § 14:34.5.1 (Battery of a bus operator), § 14:34.6 (Disarming of a peace officer), § 14:34.7 (Aggravated second degree battery), § 14:35 (Simple battery), § 14:35.1 (Battery of a child welfare or adult protective service worker), § 14:35.2 (Simple battery of the infirm), § 14:35.3 (Domestic abuse battery), § 14:36 (Assault defined), § 14:37 (Aggravated assault), § 14:37.1 (Assault by drive-by shooting), § 14:37.2 (Aggravated assault upon a peace officer with a firearm), § 14:37.3 (Unlawful use of a laser on a police officer), § 14:37.4 (Aggravated assault with a firearm), § 14:37.5 (Aggravated assault upon a utility service employee with a firearm), § 14:37.6 (Aggravated assault with a motor vehicle upon a peace officer), § 14:37.7 (Domestic abuse aggravated assault) § 14:38 (Simple assault), § 14:38.1 (Mingling harmful substances), § 14:38.2 (Assault on a school teacher), § 14:38.3 (Assault on a child welfare worker), § 14:39 (Negligent injuring), § 14:39.1 (Vehicular negligent injuring), § 14:39.2 (First degree vehicular negligent injuring), § 14:40 (Intimidation by officers), § 14:40.1 (Terrorizing), § 14:40.2 (Stalking), § 14:40.3 (Cyberstalking), § 14:40.4 (Burning cross on property of another or public place; intent to intimidate), § 14:40.5 (Public display of a noose on property of another or public place; intent to intimidate), § 14:40.6 (Unlawful disruption of the operation of a school; penalties), § 14:40.7 (Cyberbullying), § 14:41 (Rape; defined), § 14:42 (First degree rape), § 14:42.1 (Second degree rape), § 14:43 (Third degree rape), § 14:43.1 (Sexual battery), § 14:43.1.1 (Misdemeanor sexual battery) § 14:43.2 (Second degree sexual battery), § 14:43.3 (Oral sexual battery), § 14:43.4 (Female genital mutilation) § 14:43.5 (Intentional exposure to aids virus), § 14:43.6 (Administration of medroxyprogesterone acetate (mpa) to certain sex offenders), § 14:44 (Aggravated kidnapping), § 14:44.1 (Second degree kidnapping), § 14:44.2 (Aggravated kidnapping of a child), § 14:45 (Simple kidnapping), § 14:45.1 (Interference with the custody of a child), § 14:46 (False imprisonment), § 14:46.1 (False imprisonment; offender armed with dangerous weapon), § 14:46.2 (Human trafficking), § 14:46.3 (Trafficking of children for sexual purposes), § 14:46.4 (Re-homing of a child) § 14:47 (Defamation) § 14:50.2 (Perpetration or attempted perpetration of certain crimes against a victim sixty-five years of age and older).

reapply one year after the Board's original denial of parole, and then every two years after that. However, this is not true for convictions for a sex offense or homicide (*see* subsection iii below).

iii. *Sex offense or homicide: every two years*<sup>114</sup>

If your conviction was for a sex offense (as defined in Louisiana Administrative Code, Section 22, Part XI, Chapter 9, § 903<sup>115</sup>), OR for first- or second-degree murder (if your sentence was reduced to a fixed term of years and you are otherwise eligible for parole), OR for manslaughter, then you may reapply every two years from the Board's original denial of parole.

iv. *Parole revoked*<sup>116</sup>

If you have been previously released on parole or diminution of sentence/parole supervision, and your parole was revoked for any reason, you may request reconsideration by the committee. You must make this request in writing no later than 21 days from the date of the hearing where your parole was revoked.

Please note that this does NOT apply if your conviction was for a sex offense, OR for first- or second-degree murder (if your sentence was reduced to a fixed term of years and you are otherwise eligible for parole), OR for manslaughter. If your conviction is in those categories, *see* subsection iii above.

## 2. Parole Conditions

The rules for parole conditions are found in the Louisiana Administrative Code, Section 22, Part XI, Chapter 9, § 901.<sup>117</sup> These rules are described below.

a. Listed in Certificate of Parole

Before you are released, you should be told the conditions of your parole both orally and in writing.<sup>118</sup> Your conditions of parole are those things that you must do or not do in order to ensure that your parole is not revoked. These conditions are listed in your Certificate of Parole. The Certificate of Parole will not go into effect until you show that you understand the conditions of your release by agreeing to them in writing.<sup>119</sup>

Though the conditions of your parole are listed in the Certificate of Parole, there may be other conditions of parole that are not listed in the Certificate of Parole.<sup>120</sup> You should ask the Parole Board or your supervising officer as soon as possible to explain to you any additional conditions of your parole that are not listed in the Certificate of Parole.

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<sup>114</sup> LA. ADMIN. CODE tit. 22 § 705(C)(3) (2017).

<sup>115</sup> LA. ADMIN. CODE tit. 22 § 903 (2017). Section 903 defines the term *sex offender*. You are a sex offender if you have been convicted for the commission or attempted commission of any of the following offenses (or the equivalent, if committed in another jurisdiction): (1) aggravated rape, forcible rape, simple rape (2) sexual battery, aggravated sexual battery, oral sexual battery, aggravated oral sexual battery (3) intentional exposure of AIDS virus (4) bigamy, abetting in bigamy (5) incest, aggravated incest (6) carnal knowledge of a juvenile, indecent behavior with a juvenile, pornography involving a juvenile, molestation of a juvenile (7) crime against nature, aggravated crime against nature; or (8) contributing to the delinquency of juveniles by the performance of any sexual immoral act.

<sup>116</sup> LA. ADMIN. CODE tit. 22 § 705(D)(2)(a) (2017).

<sup>117</sup> LA. ADMIN. CODE tit. 22 § 901 (2017).

<sup>118</sup> LA. ADMIN. CODE tit. 22 § 901(A)(1) (2017).

<sup>119</sup> LA. ADMIN. CODE tit. 22 § 901(A) (2017).

<sup>120</sup> LA. ADMIN. CODE tit. 22 § 901(A)(2) (2017).

i. *Special Parole Conditions*

In addition to any conditions outlined by your Parole Certificate, the Certificate of Parole may also provide conditions listed in Louisiana law under R.S. 15:574.4(H).<sup>121</sup> These conditions *only* apply to intensive supervision parole.<sup>122</sup> These conditions may require you to:

- 1) Receive multiple monthly visits from supervising officers without warning;
- 2) Follow any curfew set by your supervising officers;
- 3) Perform at least one hundred hours of unpaid community service during your intensive parole supervision period and, if you are unemployed, perform additional hours;
- 4) Refrain from using or possessing any controlled dangerous substance or alcoholic beverage and submit, at your own expense, to screening, evaluation, and treatment for controlled dangerous substance or alcohol abuse as directed by your supervising officers; or
- 5) Pay any costs as ordered by your sentencing court or the Board of Parole.<sup>123</sup>

In addition to any intensive supervision parole requirements, and even if you are not under intensive supervision parole, you may have other special conditions of parole. These may require you to:<sup>124</sup>

- 1) Attend AA/NA meetings (the Board may specify the number of meetings you attend weekly);
- 2) Undergo mental health evaluation and treatment;
- 3) Undergo substance abuse evaluation and treatment;
- 4) Pay restitution for a direct money loss other than damage to or loss of property;
- 5) Pay fines and/or costs of court;
- 6) Refrain from contacting your victim(s);
- 7) Refrain from contacting your co-defendant(s);
- 8) Pursue or get a GED, vocational-tech, or other educational plan;
- 9) Comply with a treatment plan as ordered in any Substance Abuse Discharge Summary;
- 10) Follow any other special conditions that the Board may think appropriate.

The Parole Board may also place other conditions on your parole, depending on the details of the crime. Those might include:<sup>125</sup>

- 1) If your victim had damage to his/her property, then you will be required to pay for it, either in a lump sum or in monthly installments. If the victim was paid from the Crime Victims Reparations

<sup>121</sup> LA. ADMIN. CODE tit. 22 § 901(A)(2) (2017). LA. REV. STAT. ANN. § 15:574.4.4(H) (2017): When an offender completes intensive incarceration, the Board of Parole shall review the case of the offender and recommend either that the offender be released on intensive parole supervision or that the offender serve the remainder of his sentence as provided by law. When the offender is released to intensive parole supervision by the Board, the Board shall require the offender to comply with the following conditions of intensive parole supervision in addition to any other conditions of parole ordered by the Board:

- (1) Be subject to multiple monthly visits with his supervising officers without prior notice.
- (2) Abide by any curfew set by his supervising officers.
- (3) Perform at least one hundred hours of unpaid community service work during the period of intensive parole supervision and, if unemployed, perform additional hours as instructed by his supervising officers.
- (4) Refrain from using or possessing any controlled dangerous substance or alcoholic beverage and submit, at his own expense, to screening, evaluation, and treatment for controlled dangerous substance or alcohol abuse as directed by his supervising officers.
- (5) Pay any costs as ordered by the sentencing court or Board of Parole.

<sup>122</sup> LA. ADMIN. CODE tit. 22 § 901(B) (2017). See Online Publications of the Louisiana Code, *available at* <http://www.doa.la.gov/pages/osr/lac/books.aspx> (last visited Jan. 22, 2018). See footnote 121 for full text of LA. REV. STAT. ANN. § 15:574.4.4(H) (2017), *available at* <http://www.legis.la.gov/Legis/Law.aspx?d=724971> (last visited Jan. 22, 2018).

<sup>123</sup> LA. REV. STAT. ANN. § 15:574.4.4(H)(1)–(5) (2017).

<sup>124</sup> LA. ADMIN. CODE tit. 22 § 901(B) (2017).

<sup>125</sup> LA. ADMIN. CODE tit. 22 § 901(C) (2017).

Fund, then the Board will order you to repay the Fund. The Department of Public Safety and Corrections will verify whether you have paid.<sup>126</sup>

- 2) If you owe any costs of court, costs of the prosecution or proceeding, or any fine that is a part of your sentence, then you must pay in either a lump sum or a schedule of payments, based on your ability to pay.<sup>127</sup>
- 3) If you do not have a high school degree or GED, then the Board will require you to enroll in and attend an adult education or reading program until you obtain a GED, or until you complete the program and have attained a sixth-grade reading level, or until your term of parole is over, whichever happens first. You must pay all costs of this requirement.<sup>128</sup> However, this condition may be suspended if there are no such programs in the place where you will be living, if you cannot afford such a program, or if attendance would create an undue hardship for you.<sup>129</sup> This condition does not apply to you if you are unable to participate due to reasons related to mental, physical, age, infirmity, or dyslexia (or other such learning disorders) issues.<sup>130</sup>

### 3. Grievances

#### a. What Counts as a Grievance?

You may file a grievance if there was a violation of parole rules. The violation must be a violation of the Louisiana Board of Parole Rules and Procedures, Department of Public Safety and Corrections regulations, or the Louisiana Revised Statutes.<sup>131</sup> Any person may file a grievance under this procedure.<sup>132</sup> The person you file a grievance against has the right to be represented by a lawyer.<sup>133</sup>

However, you CANNOT file a grievance against the Board or its members for a decision of the Board regarding:<sup>134</sup>

- 1) Release or delayed release on parole;
- 2) New or modified parole conditions;
- 3) The ending or restarting of parole supervision or discharge from parole before the end of the parole period; or
- 4) The revocation or reconsideration of revocation of parole (except for the denial of a parole revocation hearing that is otherwise allowed under R.S. 15:574.9<sup>135</sup>).

For example, in one case, a Louisiana court found that you cannot appeal a Board decision that prevents early release on parole.<sup>136</sup>

#### b. Procedure

In order to file a grievance, you must write it down and then give it to the chairman of the Board.<sup>137</sup> When the chairman gets the grievance, he will review it and, if appropriate, will give it to the proper authority for further action.<sup>138</sup>

<sup>126</sup> LA. ADMIN. CODE tit. 22 § 901(C)(1) (2017).

<sup>127</sup> LA. ADMIN. CODE tit. 22 § 901(C)(2) (2017).

<sup>128</sup> LA. ADMIN. CODE tit. 22 § 901(C)(3)(a) (2017).

<sup>129</sup> LA. ADMIN. CODE tit. 22 § 901(C)(3)(b) (2017).

<sup>130</sup> LA. ADMIN. CODE tit. 22 § 901(C)(3)(c) (2017).

<sup>131</sup> LA. ADMIN. CODE tit. 22 § 1701(B) (2017).

<sup>132</sup> LA. ADMIN. CODE tit. 22 § 1701(A) (2017).

<sup>133</sup> LA. ADMIN. CODE tit. 22 § 1701(C) (2017).

<sup>134</sup> LA. ADMIN. CODE tit. 22 § 1701(A) (2017).

<sup>135</sup> LA. REV. STAT. ANN. § 15:574.9 (2017): “When a parolee has been returned to the physical custody of the Department of Public Safety and Corrections, office of corrections services, the Board shall hold a hearing to determine whether his parole should be revoked, unless said hearing is expressly waived in writing by the parolee. A waiver shall constitute an admission of the findings of the pre-revocation proceeding and result in immediate revocation.”

<sup>136</sup> *Sinclair v. Stalder*, 2003-1568, p. 2 (La. App. 1 Cir. 10/17/03); 867 So. 2d 743, 744.

<sup>137</sup> LA. ADMIN. CODE tit. 22 § 1703(A) (2017).

<sup>138</sup> LA. ADMIN. CODE tit. 22 § 1703(A) (2017).



If your grievance relates to the Board, or a member of the Board, or the staff assigned to the Board, the chairman or his designee will investigate to see if your grievance is true.<sup>139</sup> If your grievance is found to possibly be true, then the chairman will try to fix the grievance.<sup>140</sup>

If the chairman cannot fix the grievance, then your grievance will be given to a grievance committee to handle.<sup>141</sup> This grievance committee is made up of the chairman of the Board, the vice chairman, and any other people selected by both the chairman and the vice chairman.<sup>142</sup> The chairman cannot be on the committee if the grievance is about him.<sup>143</sup> The vice chairman also cannot be on the committee if the grievance is about him or the chairman.<sup>144</sup>

If the grievance committee cannot fix the grievance, then your grievance will be given to the governor's executive counsel, along with any supporting documents.<sup>145</sup> The supporting documents will include:<sup>146</sup>

- 1) A reference to the relevant statute, rules, regulations, and/or code of ethics, etc. that you claim the Board violated;
- 2) A written summary of the attempts made to fix the grievance; and
- 3) Any other relevant documents.

If the grievance is against the chairman of the Board, the grievance will be given directly to the vice chairman.<sup>147</sup> In this situation, the chairman will not serve on the grievance committee and will not appoint someone to stand in for him on the committee.<sup>148</sup> Similarly, if the grievance is against the vice chairman, the vice chairman will not serve on the grievance committee and will not appoint someone to stand in for him on the committee.<sup>149</sup> The remaining member of the committee will select a member of the Board to serve in place of the chairman or vice chairman.<sup>150</sup> If the grievance is against a Board member, that member will not serve on the committee.<sup>151</sup>

The decision of the chairman, the grievance committee, or the executive counsel (whichever applies, depending on the situation) is final, and you cannot appeal it.<sup>152</sup>

A written response to the grievance will be mailed to you.<sup>153</sup> If a Board member violated the Louisiana Board of Parole Rules and Procedures, the Department of Public Safety and Corrections regulations, or the Louisiana Revised Statutes, that Board member will get a letter about the violation.<sup>154</sup> The governor will also receive a copy of that letter for settling the matter.<sup>155</sup>

#### D. END OF PAROLE

Your parole can end by termination or revocation. This Section will focus on the revocation of parole, where you may be taken off parole and returned to prison or jail. This Section will discuss how the Parole Board can revoke your parole and will explain the procedure through which your parole may be

<sup>139</sup> LA. ADMIN. CODE tit. 22 § 1703(B) (2017).

<sup>140</sup> LA. ADMIN. CODE tit. 22 § 1703(B)(1) (2017).

<sup>141</sup> LA. ADMIN. CODE tit. 22 § 1703(B)(2) (2017).

<sup>142</sup> LA. ADMIN. CODE tit. 22 §§ 1703(B)(2)(a)–(c) (2017).

<sup>143</sup> LA. ADMIN. CODE tit. 22 § 1703(D)(1) (2017).

<sup>144</sup> LA. ADMIN. CODE tit. 22 § 1703(B)(2)(b), (D)(2) (2017).

<sup>145</sup> LA. ADMIN. CODE tit. 22 § 1703(C) (2017).

<sup>146</sup> LA. ADMIN. CODE tit. 22 §§ 1703(C)(1)–(3) (2017).

<sup>147</sup> LA. ADMIN. CODE tit. 22 § 1703(D)(1) (2017).

<sup>148</sup> LA. ADMIN. CODE tit. 22 § 1703(D)(1) (2017).

<sup>149</sup> LA. ADMIN. CODE tit. 22 § 1703(D)(2) (2017).

<sup>150</sup> LA. ADMIN. CODE tit. 22 § 1703(D)(3) (2017).

<sup>151</sup> LA. ADMIN. CODE tit. 22 § 1703(D)(4) (2017).

<sup>152</sup> LA. ADMIN. CODE tit. 22 § 1703(E) (2017).

<sup>153</sup> LA. ADMIN. CODE tit. 22 § 1705(A) (2017).

<sup>154</sup> LA. ADMIN. CODE tit. 22 § 1705(B) (2017).

<sup>155</sup> LA. ADMIN. CODE tit. 22 § 1705(B) (2017).

revoked. For example, you may be required to attend a pre-revocation hearing or a revocation hearing, depending on the parole violation in question. Finally, this Section will explain the various decisions that the Parole Board may make and how you may appeal the revocation of your parole.

### 1. How and Why Parole Revocation Begins

If an arresting police officer has “probable cause” to believe that you violated your parole, he can enter your house without an arrest warrant.<sup>156</sup> “Probable cause” means there is a reasonable basis for the belief of guilt, supported by more than just suspicion, but less than conclusive proof.<sup>157</sup>

#### a. Technical Violations

A technical violation is any violation of your conditions of parole that is not a felony conviction (discussed in Part D(1)(b) below).<sup>158</sup> Therefore, if you engage in felony or misdemeanor behavior (even if a court has not had the opportunity to review that behavior), you can still violate your parole.<sup>159</sup> Thus, even before a court finds that your behavior is a felony or misdemeanor, you may have your parole revoked if your behavior amounts to a technical violation of your parole. If you are held in jail by the Division of Probation and Parole for committing a technical violation of your parole, you will have a pre-revocation hearing at your place of detention scheduled as soon as possible.<sup>160</sup> Pre-revocation hearings are discussed in Part D(2)(b).

#### b. New Felony Convictions

If you are convicted and sentenced for a new felony and the appeals process has been exhausted (meaning you have unsuccessfully gone through all your opportunities to appeal),<sup>161</sup> your parole will be *automatically* revoked.<sup>162</sup> You will not have a right to a revocation hearing if you are convicted for a felony. Revocation hearings are discussed in detail in Part D(2)(c). It is possible that your parole may be revoked before you exhaust all appeals of your new convictions. The behavior that led to your new felony conviction may also represent a technical violation, in which case your parole may be revoked.<sup>163</sup>

#### c. Convictions in Other States

If you are convicted of a new felony in another state, your parole will automatically be revoked.<sup>164</sup> If your parole is automatically revoked, you will not have any right to a preliminary or final revocation hearing.<sup>165</sup> If you are convicted of a misdemeanor in another state, but that misdemeanor would be a

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<sup>156</sup> See *State v. Bass*, 595 So. 2d 820, 823 (La. App. 2 Cir. 1992), *writ denied*, 598 So. 2d 373 (La. 1992) (holding that the arrest warrant requirement for arresting someone in their home does not apply to the search of a parolee’s home when arresting a parolee for violation of his parole).

<sup>157</sup> See *U.S. v. One 1987 Mercedes 560 SEL*, 919 F.2d 327, 331 (5th Cir. 1990) (providing a definition of probable cause).

<sup>158</sup> LA. ADMIN. CODE tit. 22 § 1101(B)(1) (2017).

<sup>159</sup> LA. ADMIN. CODE tit. 22 § 1101(B)(1) (2017). See *State v. Brown*, 387 So. 2d 567, 569 (La. 1980) (stating that associating with other felons and failing to notify parole officer about a job change could be technical violations). See also *McKendall v. Tanner*, 2009 WL 1811013, at \*7 (E.D. La. 2009) (upholding Parole Board’s decision to revoke parole because parolee violated condition of parole of going to a substance abuse program).

<sup>160</sup> LA. ADMIN. CODE tit. 22 § 1101(B)(2) (2017).

<sup>161</sup> See *State ex rel. Clark v. Hunt*, 337 So. 2d 438, 440 (La. 1976) (holding that a conviction itself is only a violation of parole when the conviction is final). Your appeals process has been exhausted when you can no longer appeal your conviction. For more information on appeals, refer to Chapter 3 of this Supplement, “Appealing Your Conviction.”

<sup>162</sup> See *Lay v. Louisiana Parole Bd.*, 98-0053, p. 9 (La. App. 1 Cir 04/01/99); 741 So. 2d 80, 87 (holding that automatic revocation of parole after new felony conviction does not violate due process).

<sup>163</sup> LA. ADMIN. CODE tit. 22 § 1101(A)(1) (2017).

<sup>164</sup> LA. ADMIN. CODE tit. 22 § 1101(A)(2) (2017).

<sup>165</sup> See *generally Lay v. Louisiana Parole Bd.*, 98-0053 (La. App. 1 Cir 04/01/99); 741 So. 2d 80, 87 (discussing automatic revocation of parole). If you are not entitled to a preliminary or final revocation hearing, this means that you have effectively been denied a revocation hearing and can only appeal that denial to an appellate court. If you do not appeal, any decision made by the Board after the denial of your hearing and regarding your revocation and sentence will be final. See Part 2 of this Chapter.

felony in Louisiana, then your parole will also be automatically revoked.<sup>166</sup> When you are released from the other state's prison system, you will be returned to Louisiana, where you will have to serve the remainder of your original sentence.<sup>167</sup>

d. Absconders

You are considered to have “absconded supervision” if you leave your approved place of residence without getting permission from the Division of Probation and Parole.<sup>168</sup> If you leave your approved place of residence without permission and you are taken into custody, you will be returned to the Department of Public Safety and Corrections for a revocation hearing.<sup>169</sup> If you abscond out of state, you will not be entitled to a pre-revocation hearing.<sup>170</sup> A warrant also may be issued for your arrest if you are charged with absconding your parole.<sup>171</sup>

When you get returned to the Department of Public Safety and Corrections, the Department will fill out a parole revocation form and send it to the Board.<sup>172</sup> You should carefully examine the terms of your parole regarding where you are allowed to go and what permission you need to go to a location, in order to make sure that you are not deemed to have absconded.

## 2. Revocation Procedure

a. Activity Report

If you violate the terms of your parole, the Division of Probation and Parole must submit an activity report to the Parole Board.<sup>173</sup> This report must include a short summary of the violation and may include a recommendation for action based on the facts of the case and the seriousness of the violation.<sup>174</sup> These include, but are not limited to, the recommendations that:

- 1) An arrest warrant should be issued;
- 2) Bond should be allowed;
- 3) New conditions of parole should be added;
- 4) Certain conditions of parole should be removed; or
- 5) Your arrest warrant should be recalled.<sup>175</sup>

After the activity report is received, your case will be decided by the Division of Probation and Parole.<sup>176</sup> After the Division decides on a recommendation, it will send a decision notice to the Probation and Parole District Officer where you are assigned.<sup>177</sup> You will then receive notice of the decision.<sup>178</sup>

b. Pre-revocation Hearing

<sup>166</sup> LA. ADMIN. CODE tit. 22 § 1101(A)(2) (2017).

<sup>167</sup> LA. ADMIN. CODE tit. 22 § 1301(A)(2) (2017).

<sup>168</sup> LA. ADMIN. CODE tit. 22 § 1101(C)(1) (2017); *see also* Jones v. Cooper, No. 09-0086, 2009 WL 4823837, at \*9–10 (W.D. La. Dec. 14, 2009) (explaining the difference between “absconding” and “failing to report”).

<sup>169</sup> LA. ADMIN. CODE tit. 22 § 1101(C)(2) (2017).

<sup>170</sup> LA. ADMIN. CODE tit. 22, § 1101(C)(2)(a) (2017); *see also* Jones v. Cooper, No. 09-0086, 2009 WL 4823837, at \*9 (W.D. La. Dec. 14, 2009) (holding that someone who absconded does not have a right to a pre-revocation hearing).

<sup>171</sup> *See* Scott v. Travis, 07-4150 (E.D. La. 01/11/08); 2008 WL 161716, at \*1 (discussing arrest warrant issued for parolee suspected of absconding).

<sup>172</sup> LA. ADMIN. CODE tit. 22 § 1101(C)(2)(c) (2017).

<sup>173</sup> LA. ADMIN. CODE tit. 22 § 1103(A) (2017).

<sup>174</sup> LA. ADMIN. CODE tit. 22 § 1103(A) (2017).

<sup>175</sup> LA. ADMIN. CODE tit. 22 § 1103(B)(1) (2017).

<sup>176</sup> LA. ADMIN. CODE tit. 22 § 1103(D) (2017).

<sup>177</sup> LA. ADMIN. CODE tit. 22 § 1103(D) (2017).

<sup>178</sup> LA. ADMIN. CODE tit. 22 § 1103(D) (2017).

If you are suspected of violating the terms of your parole, a pre-revocation hearing will be held to determine if there is “probable cause” that you violated the conditions of your parole.<sup>179</sup> “Probable cause” exists when there is a reasonable basis for the belief of guilt, supported by more than just suspicion, but less than conclusive proof.<sup>180</sup> If you are detained for violations of the conditions of your parole, then you must be given a pre-revocation hearing, unless there are other relevant rules.<sup>181</sup> For example, if you are an absconder or have been convicted of a new offense, you may not have the right to a pre-revocation hearing.<sup>182</sup>

#### i. *Pre-revocation Hearing Procedure*

A pre-revocation hearing is held in front of an officer from the Probation and Parole District Office.<sup>183</sup> The hearing must take place within a “reasonable time” following your detention and in a location close to where the alleged violation took place so that you can bring witnesses.<sup>184</sup> The hearing officer should not know you or anything about the facts surrounding the allegations that you violated your parole until the hearing takes place.<sup>185</sup> If the officer finds that there is probable cause that you violated your parole, then you may be held in detention until your final revocation hearing, as discussed in Section D(2)(c).<sup>186</sup> The facts and allegations in the pre-revocation hearing documents, such as the Activity Report, will be considered at the final revocation hearing stage.<sup>187</sup> Once the hearing is complete, the officer will rule whether there is probable cause.<sup>188</sup>

#### ii. *Your Rights at your Pre-revocation Hearing*

Before your hearing, you must get a written notification that states the charges against you, your rights at the hearing, and the date, time, and place of the hearing.<sup>189</sup> You have the right to an attorney at your pre-revocation hearing.<sup>190</sup> You might even have an attorney appointed for you.<sup>191</sup> You also have the right to waive your pre-revocation hearing.

#### iii. *Pre-revocation Hearing Findings*

If the hearing officer rules that there is no probable cause to believe that you violated your parole, then you will be released from custody.<sup>192</sup> However, if the hearing officer finds that there is probable cause, he will make one of four possible recommendations to the Parole Board:

- 1) That you should be detained;

<sup>179</sup> LA. ADMIN. CODE tit. 22 § 1105(A) (2017).

<sup>180</sup> See *U.S. v. One 1987 Mercedes 560 SEL*, 919 F.2d 327, 331 (5th Cir. 1990) (defining “probable cause”).

<sup>181</sup> See *Frank v. Pitre*, 353 So. 2d 1293, 1295 (La. 1977) (holding that parole violator has a right to a “quick ‘probable cause’ hearing when charged with violating conditions” of parole).

<sup>182</sup> LA. REV. STAT. ANN. § 15:574.9(C) (2017); see *Pickens v. Butler*, 814 F.2d 237, 241 (5th Cir. 1987) (holding that parolee did not have right to pre-revocation or revocation hearing after being convicted of felony); see also *Jones v. Cooper*, 09-0086 (W.D. La. Dec. 14, 2009); 2009 WL 4823837, at \*9 (holding that absconder is not entitled to a pre-revocation hearing).

<sup>183</sup> LA. ADMIN. CODE tit. 22 § 1105(A) (2017).

<sup>184</sup> LA. ADMIN. CODE tit. 22 § 1105(A)(3) (2017); see also *Morrissey v. Brewer*, 408 U.S. 471, 488, 92 S. Ct. 2593, 2604, 33 L. Ed. 2d 484 (1972) (holding that a pre-revocation hearing must take place within a “reasonable time” after the parolee’s detention); see also *State v. Langley*, 95-1489, p. 24 (La. 04/14/98); 711 So. 2d 651, 669 (stating that an “unreasonable delay” may violate due process).

<sup>185</sup> LA. ADMIN. CODE tit. 22 § 1105(A) (2017).

<sup>186</sup> LA. ADMIN. CODE tit. 22 § 1107(A)(2) (2017).

<sup>187</sup> LA. ADMIN. CODE tit. 22 § 1105(A)(3) (2017).

<sup>188</sup> LA. ADMIN. CODE tit. 22 § 1105(C)(3) (2017).

<sup>189</sup> LA. ADMIN. CODE tit. 22 § 1105(B)(1) (2017).

<sup>190</sup> LA. ADMIN. CODE tit. 22 § 1105(C)(1) (2017).

<sup>191</sup> LA. ADMIN. CODE tit. 22 § 1105(C)(1) (2017). For more information on whether you are eligible to have an attorney appointed to you at the pre-revocation hearing, please refer to Chapter 4 of the main *JLM*.

<sup>192</sup> LA. ADMIN. CODE tit. 22 § 1107(A)(1) (2017).

- 2) If new charges are pending, that you should be allowed to make bond while waiting for the Parole Board to make its final decision;<sup>193</sup>
- 3) That you should remain incarcerated without bond until the Board makes its final decision, or
- 4) That you should be reprimanded (disciplined) and remain under parole supervision.<sup>194</sup>

If the hearing officer finds probable cause, he will complete a parole revocation questionnaire and send it to the Parole Board.

#### iv. *Violation Report*

After the pre-revocation hearing officer makes his decision (or after you waive your right to a pre-revocation hearing), the Division of Probation and Parole prepares a violation report.<sup>195</sup> The Division of Probation and Parole must complete this report within five days of receiving the pre-revocation decision.<sup>196</sup> The report must:

- 1) Contain a summary of your conduct on supervision;
- 2) Advise the Parole Board of your alleged violations; and
- 3) Make recommendations to the Board for action.<sup>197</sup>

The violation report may recommend a number of actions, including automatic revocation, reprimand, or creation of new conditions of parole.<sup>198</sup> The actions recommended may be temporary or final.<sup>199</sup> The violation report and all corresponding documentation are then forwarded to the Parole Board.<sup>200</sup> After the case is decided, a decision notice will be sent to you and the Probation and Parole District Office where you are placed under supervision.<sup>201</sup>

#### c. *Revocation Hearing*

If both the pre-revocation hearing officer and the Division of Probation and Parole have found probable cause, the next and final step is a revocation hearing with the Parole Board.<sup>202</sup> At the final revocation hearing, the Board determines if you violated one or more of the conditions of your parole.<sup>203</sup> Unlike in a criminal trial where the standard of proof is “beyond a reasonable doubt” (where no reasonable person who examines the evidence would think that the person is innocent), at a revocation hearing, the standard of proof is “by a preponderance of the evidence” (where the evidence simply persuades the decision maker of your guilt).<sup>204</sup> As a parolee, you may, upon request, be given the right to an attorney at the revocation hearing.<sup>205</sup> First, you must make a claim that you have not committed the alleged violations or that even if you did, there are substantial reasons that explain or mitigate (reduce your blameworthiness) the violations. Next, you must also claim that it may be difficult for you to present these

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<sup>193</sup> In Louisiana, you have a right to bail. Before and during your trial, you shall be bailable unless you are charged with a capital offense. However, if you are charged with a violent crime or certain controlled dangerous substances laws, you may not be bailable if there is clear and convincing evidence that there is a substantial risk that you may flee while on bond or that you may pose a danger to another person or the community. LA. CONST. art. I, § 18.

<sup>194</sup> LA. ADMIN. CODE tit. 22 § 1107(A)(2) (2017).

<sup>195</sup> LA. ADMIN. CODE tit. 22 § 1109(C) (2017).

<sup>196</sup> LA. ADMIN. CODE tit. 22 § 1109(C) (2017).

<sup>197</sup> LA. ADMIN. CODE tit. 22 § 1109(A)(1) (2017).

<sup>198</sup> LA. ADMIN. CODE tit. 22 § 1109(B) (2017).

<sup>199</sup> LA. ADMIN. CODE tit. 22 § 1109(A)(2) (2017).

<sup>200</sup> LA. ADMIN. CODE tit. 22 § 1109(C) (2017).

<sup>201</sup> LA. ADMIN. CODE tit. 22 § 1109(E) (2017).

<sup>202</sup> LA. ADMIN. CODE tit. 22 § 1113 (2017).

<sup>203</sup> LA. ADMIN. CODE tit. 22 § 1113(A) (2017).

<sup>204</sup> *Powell v. Louisiana Parole Bd.*, 2010-2058 (La. App. 1 Cir. 5/6/11); 2011 La. App. LEXIS 317, at \*3 (unpublished) (upholding the Parole Board's decision to revoke parole “because a preponderance of the evidence established that [the defendant] had been engaged in criminal activity.”).

<sup>205</sup> *Gagnon v. Scarpelli*, 411 U.S. 778, 790–791, 93 S. Ct. 1756, 1764, 36 L. Ed. 2d 656 (1973); *State v. Rideau*, 376 So. 2d 1251, 1253 (La. 1979).

claims without the assistance of counsel.<sup>206</sup> If your request for counsel is denied, the reason will be stated in the record.<sup>207</sup> A revocation hearing is somewhat less formal than a typical criminal trial, and the Board can more freely consider hearsay and circumstantial evidence.<sup>208</sup> The Board then decides whether the violations were severe enough to justify sending you back to prison to serve the rest of your sentence.<sup>209</sup>

### i. *Your Rights at the Revocation Hearing*

You must be present at the hearing and you may be represented by an attorney.<sup>210</sup> You have some due process rights at the revocation hearings,<sup>211</sup> but you do not have all the rights that you would have in a normal criminal prosecution.<sup>212</sup> The United States Supreme Court has held that you have the following rights at revocation hearings:

- 1) The right to written notice of the alleged violation;
- 2) The right to know the evidence against you;
- 3) An opportunity to be heard in person and to present evidence and witnesses,
- 4) The right to confront and cross-examine adverse witnesses;
- 5) The right to a neutral, detached body to consider the claim against you; and
- 6) The right to receive a written statement by the fact finders stating the evidence they used and their reasons for revoking parole.<sup>213</sup>

In addition, you typically can bring one witness to testify on your behalf, and the Board may allow you to present more witnesses if you can show good cause (a good reason for requiring them).<sup>214</sup> The allegations will be read to you, and you will be asked to respond to each allegation by saying “guilty” or “not guilty”.<sup>215</sup> You may speak for yourself or your attorney may speak on your behalf.<sup>216</sup>

In some situations, you may not have a revocation hearing. For example, you can waive your right to a revocation hearing. However, if you waive your hearing, you are treated as if you had admitted to all of the findings in the pre-revocation proceedings and you will have your parole revoked immediately.<sup>217</sup> In addition, by law, if you are “convicted” (found guilty of committing a crime) of a new felony while on parole, you may not be granted a final revocation hearing.<sup>218</sup>

### ii. *Revocation Hearing Decisions*

At the end of the revocation hearing, the panel may make one of four decisions:

<sup>206</sup> *Gagnon v. Scarpelli*, 411 U.S. 778, 790, 93 S. Ct. 1756, 1764, 36 L. Ed. 2d 656 (1973); *State v. Rideau*, 376 So. 2d 1251, 1253 (La. 1979); *see also* *State v. Baggert*, 350 So. 2d 652, 654 (La. 1977) (discussing limits on right to counsel in parole revocation hearings).

<sup>207</sup> *Gagnon v. Scarpelli*, 411 U.S. 778, 791, 93 S. Ct. 1756, 1764, 36 L. Ed. 2d 656 (1973).

<sup>208</sup> *Powell v. Louisiana Parole Bd.*, 2010-2058 (La. App. 1 Cir. 5/6/11); 2011 La. App. LEXIS 317, at \*3 (unpublished).

<sup>209</sup> LA. ADMIN. CODE tit. 22 § 1113(A) (2017).

<sup>210</sup> LA. ADMIN. CODE tit. 22 § 1113(C) (2017).

<sup>211</sup> *See generally* *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (discussing due process rights owed to parolees at revocation hearings).

<sup>212</sup> *See* *Lay v. Louisiana Parole Bd.*, 98-0053 (La. App. 1 Cir. 4/1/99); 741 So. 2d 80, 85–86 (holding that a parolee at a revocation hearing does not have the full set of rights owed to a defendant in a criminal proceeding); *see also* *State v. Langley*, 95-1489, pp. 23–24 (La. 4/14/98); 711 So. 2d 651, 669 (parolees have less due process rights at revocation hearings than in ordinary criminal trial).

<sup>213</sup> *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 2604, 33 L. Ed. 2d 484 (1972).

<sup>214</sup> LA. ADMIN. CODE tit. 22 § 1113(C)(2) (2017).

<sup>215</sup> LA. ADMIN. CODE tit. 22 § 1113(E)(2) (2017).

<sup>216</sup> LA. ADMIN. CODE tit. 22 §§ 1113(F)(1)–(2) (2017).

<sup>217</sup> LA. REV. STAT. ANN. § 15:574.9(A) (2017).

<sup>218</sup> LA. ADMIN. CODE tit. 22 § 1117(A) (2017). *See also* *State ex. rel. Bertrand v. Hunt*, 325 So. 2d 788, 789–790 (La. 1976) (holding that due process does not require final revocation hearing where parole is automatically revoked because of the conviction of another offense). *See also* *Pickens v. Butler*, 814 F.2d 237, 239 (5th Cir. 1987) (holding that due process did not require that parolee be given final revocation hearing since revocation was mandatory by statute).

- 1) “Revoke” (take away) parole;
- 2) “Reprimand” (lecture) you and restore you to parole supervision with or without new conditions of parole;
- 3) Rule that you did not meet the requirements to terminate (get off of) parole even if the full term of parole supervision ended; or
- 4) Place you on work release for up to six months instead of revoking your parole.<sup>219</sup>

In addition to those four options, in some cases, the Board may commit you to a rehabilitation or substance abuse program as a substitute to revocation. You may be placed in such a program for up to six months, so long as the period committed does not extend the period of parole beyond the full term of parole.<sup>220</sup> The panel may choose not to issue an immediate decision until certain testimony that was unavailable at the pre-revocation hearing can be heard, further evidence can be presented, or there is an outcome to the charges pending against you.<sup>221</sup> This situation arises if evidence that was unavailable at the pre-revocation hearing becomes available at the revocation stage, or if your charged parole violation was the “commission” (act of doing) of a crime that was being considered in a separate trial.<sup>222</sup> At the end of the hearing, the panel will orally tell you its decision and then give you a copy of the Parole Revocation Decision Form.<sup>223</sup>

#### d. Review of Denial of Revocation Hearing

The Louisiana state district court will have jurisdiction to hear an appeal of a revocation hearing *only* if your right to a revocation hearing was denied.<sup>224</sup> If you seek review on the grounds that you were denied a revocation hearing, you will have 90 days from the day of revocation to file your petition.<sup>225</sup> After the 90-day period, your petition for review will be dismissed with “prejudice” (once and for all).<sup>226</sup> The only proper defendant in such a lawsuit is the Board of Parole.<sup>227</sup> You must “serve process” (give notice of any legal action) for the petition of review on the chairman of the Board of Parole or one of his designees.<sup>228</sup>

The district court will review the revocation hearing without a jury and will only look at the record created in the revocation hearing.<sup>229</sup> The district court will limit its review of the Board’s decision to the issues presented in the parolee’s petition for review.<sup>230</sup> The district court will review the findings and decisions of the Board in the revocation hearing to decide if the Board’s findings were clearly wrong and thus an abuse of its power.<sup>231</sup> The court may only review the parole revocation process to make sure that you received “due process” (fair treatment) in the revocation process.<sup>232</sup> The court may either “affirm” (confirm) the revocation decision or reverse (change or disagree with the decision) it and send the case back to the Parole Board for revocation proceedings; if the district court confirms the revocation decision, you may appeal the district court’s judgment to a court of appeal.<sup>233</sup>

<sup>219</sup> LA. ADMIN. CODE tit. 22 § 1115(A) (2017).

<sup>220</sup> LA. ADMIN. CODE tit. 22 § 1115(A)(5) (2017); LA. REV. STAT. ANN. § 15:574.7(C)(2)(b) (2017).

<sup>221</sup> LA. ADMIN. CODE tit. 22 § 1115(B) (2017).

<sup>222</sup> LA. ADMIN. CODE tit. 22 § 1115(B) (2017).

<sup>223</sup> LA. ADMIN. CODE tit. 22 § 1115(C)(1) (2017).

<sup>224</sup> LA. REV. STAT. ANN. §§ 15:574.11(A)–(C) (2017). *See* Leach v Louisiana Parole Bd., 2007-0848, p. 7 (La. App. 1 Cir. 6/6/08); 991 So. 2d 1120, 1124, *writ denied*, 2008-2385 (La. 8/12/09); 17 So. 3d 378, and *writ denied*, 2008-2001 (La. 12/18/09); 23 So. 3d 947 (affirming that only where a revocation hearing was denied may a parolee seek appellate review in court).

<sup>225</sup> LA. REV. STAT. ANN. § 15:574.11(D) (2017).

<sup>226</sup> LA. REV. STAT. ANN. § 15:574.11(D) (2017).

<sup>227</sup> LA. REV. STAT. ANN. § 15:574.11(D) (2017).

<sup>228</sup> LA. REV. STAT. ANN. § 15:574.11(D) (2017).

<sup>229</sup> LA. REV. STAT. ANN. § 15:574.11(C) (2017).

<sup>230</sup> LA. REV. STAT. ANN. § 15:574.11(C) (2017).

<sup>231</sup> *See* Bertrand v. Louisiana Parole Bd., 2006-0871, p. 4 (La. App. 1 Cir. 3/28/07); 960 So. 2d 979, 981 (upholding the Parole Board’s findings in the revocation hearing because they were not clearly wrong nor did they show an abuse of the Board’s discretion).

<sup>232</sup> *See* Morrissey v. Brewer, 408 U.S. 471, 488–489, 92 S. Ct. 2593, 2604 (1972).

<sup>233</sup> LA. REV. STAT. ANN. § 15:574.11(C) (2017). For more information on appealing your conviction, please refer to Chapter 2.

e. Effect on Sentence Length

If you are returned to incarceration for violating parole, and the violation does not include a new sentence for a felony crime, you will serve the remainder of your original sentence as of your date of release on parole.<sup>234</sup> However, your remaining sentence may be shortened depending on the relevant commutation statutes. Your remaining sentence may also be shortened for any good time credit or credit for time served for good behavior while you are on parole.<sup>235</sup> If you violate the terms of your parole and your parole is revoked, you will give up all good time earned for the part of the sentence that you served before being granted parole.<sup>236</sup>

### 3. Release from Parole Supervision

a. Suspension of Supervised Parole

The Parole Board may find that you should be on unsupervised parole and suspend your supervision.<sup>237</sup> Under unsupervised parole, you will not be supervised by your parole officer. Nonetheless, you will still be expected to comply with the requirements of your parole. However, in order to have your parole supervision suspended, you must have been on supervised parole for at least one and a half years, the Division of Probation and Parole must recommend that you be placed on unsupervised parole, and you must meet other standards, as well.<sup>238</sup> If you believe you are qualified for early release, you should consult your parole office. However, if you commit parole violations prior to the end of your full-term discharge date, your parole may be revoked. You may also be placed back on maximum supervision parole at any time prior to the end of your full-term discharge date if the Division of Probation and Parole makes a report that shows that maximum supervision is in the interests of the public or the parolee.<sup>239</sup>

b. Termination of parole

As a parolee, you will be given a Certificate of Discharge from the Department of Public Safety and Corrections when you complete your sentence.<sup>240</sup> The Parole Board cannot terminate your parole until the full-term discharge date.<sup>241</sup>

c. Your Rights on Release from Parole Supervision

If you are convicted of a felony and are on parole, you may lose certain rights.<sup>242</sup> However, the Louisiana constitution provides that your “full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense”.<sup>243</sup> The full rights of citizenship include basic rights of citizenship such as “the right to vote, work or hold public office.”<sup>244</sup> However, upon release from parole, you may lose certain freedoms, such as the privilege to hold a license to practice certain professions.<sup>245</sup>

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<sup>234</sup> LA. ADMIN. CODE tit. 22 § 1301(A)(2) (2017).

<sup>235</sup> LA. ADMIN. CODE tit. 22 § 1301(A)(2) (2017). A commutation statute is a statute that regards the shortening of a legal punishment, often the length of imprisonment. For more information on commutation statute, please refer to Part B(4) of this Chapter.

<sup>236</sup> LA. ADMIN. CODE tit. 22 § 1301(A)(3) (2017).

<sup>237</sup> LA. ADMIN. CODE tit. 22 § 1501(A) (2017).

<sup>238</sup> LA. ADMIN. CODE tit. 22 § 1501(A) (2017).

<sup>239</sup> LA. ADMIN. CODE tit. 22 § 1501(B) (2017).

<sup>240</sup> LA. ADMIN. CODE tit. 22 § 1503 (2017).

<sup>241</sup> LA. ADMIN. CODE tit. 22 § 1503 (2017).

<sup>242</sup> See LA. CONST. art I, § 3 (right against involuntary servitude).

<sup>243</sup> LA. CONST. art I, § 20.

<sup>244</sup> *State v. Adams*, 355 So. 2d 917, 922 (La. 1978).

<sup>245</sup> *State v. Adams*, 355 So. 2d 917, 922 (La. 1978).



#### D. CONCLUSION

First, you should figure out whether your conviction has any built-in parole rules. If it does, those rules apply. If not, the general rules for parole that were discussed in this chapter apply. If the general rules of parole apply to you, read Part B to determine whether you are eligible for any of those types of parole. If you are denied parole, you can apply for a rehearing. If you are denied parole, you will have another parole hearing after a certain amount of time. That amount of time will depend on what crime you were convicted of. If you are released on parole, you will be told of any conditions of parole you have. You might have special conditions for your parole. Your parole can end by termination or revocation. If you violate the terms of your parole, your parole might be revoked. In most cases, there will be several hearings to determine whether you violated the terms of your parole. In some cases, your parole can be automatically revoked without hearings. At your full-term discharge date, your parole will be terminated (ended) and you will get back some of your rights.

## CHAPTER 22: REENTRY ASSISTANCE

### A. INTRODUCTION

The state of Louisiana treats people with criminal records different than people without criminal records in many ways. This Chapter deals with Louisiana laws that may affect your life after you are released from prison. It also talks about the resources available to you before and after your reentry. Part B lists educational, skills training, and other things available to you while you are in prison. Part C is about the process of finding or keeping employment with a criminal record. Part D describes your right to financial assistance, public housing, and restrictions that may be placed on your reentry. The Appendix at the end of the chapter lists educational and skills training offerings at each state prison.

To understand how this Chapter applies to you, you should know all the offenses on your criminal record. You should also read Chapter 1 of the *Louisiana State Supplement*, “Your Right to Information,” to learn how to get a copy of your criminal record and how to expunge convictions. You should also refer to Chapter 7 of the main *Jailhouse Lawyer’s Manual (JLM)*, “Freedom of Information” for general information on the topic.

Unlike other chapters of the *Louisiana State Supplement*, this Chapter is not in the main *JLM*. This means that you will not need to consult the main *JLM* to understand most of the information in this Chapter.

### B. DEPARTMENT OF CORRECTIONS PROGRAMS

The Louisiana Department of Public Safety and Corrections (“Department”) offers a range of voluntary and mandatory programs for prisoners. These programs are supposed to help you with your reentry. This Part describes the programs that are available to you. Section 1 discusses the comprehensive and mandatory pre-release program that applies to all prisoners. Section 2 provides information on academic and vocational offerings. An Appendix at the end of the Chapter lists specific educational and vocational offerings for each prison. Section 3 describes the non-educational programs offered in prison, such as substance abuse and values programs.

#### 1. **Mandatory Reentry Assistance**

In 2002, the Louisiana Department of Corrections started a reentry assistance program known as Corrections Organized for Reentry, or “CORE.” The program is designed to reduce recidivism—which is when someone who has been convicted of a crime later commits another crime—by giving all state prisoners with the resources to succeed on their own after release. In 2009, Governor Jindal announced the expansion of the program to include prisoners in parish and local jails, whose residents comprise about half of Louisiana’s prisoner population.<sup>1</sup>

CORE is a two-step program that begins immediately upon incarceration. CORE begins when each prisoner gets assessed and gets an individual reentry plan.<sup>2</sup> You are then given the opportunity to take academic or vocational classes during your sentence.<sup>3</sup> Vocational classes teach you skills necessary for working in a specific job. You can also do faith-based and substance abuse programs.<sup>4</sup> For more information about these classes, refer to Sections 2 and 3 of this Part.

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<sup>1</sup> Governor Jindal Announces New Re-Entry Program for State Inmates in Parish Prisons to Reduce Recidivism Rate and Make Communities Safer, *available at* <https://votesmart.org/public-statement/414021/governor-jindal-announces-new-re-entry-program-for-state-inmates-in-parish-prisons-to-reduce-recidivism-rate-and-make-communities-safer#.WdGe6UyZO-U> (last visited Oct. 1, 2017).

<sup>2</sup> James LeBlanc, 2004 Innovation Awards Program Application: CORE 2, *available at* <http://www.csg.org/knowledgecenter/docs/innov/PSJFinalist2004-LA.pdf> (last visited Oct. 1, 2017).

<sup>3</sup> James LeBlanc, 2004 Innovation Awards Program Application: CORE 2, *available at* <http://www.csg.org/knowledgecenter/docs/innov/PSJFinalist2004-LA.pdf> (last visited Oct. 1, 2017).

<sup>4</sup> James LeBlanc, 2004 Innovation Awards Program Application: CORE 2, *available at* <http://www.csg.org/knowledgecenter/docs/innov/PSJFinalist2004-LA.pdf> (last visited Oct. 1, 2017).

The second phase of CORE is release preparation. Release preparation happens about a year before your release. For 100 hours, you will be given a lot of training on money management, communication, parenting, and community resources.<sup>5</sup> The Department will help you get identification cards, Social Security benefits (if you are eligible based on your age and work history), and housing.<sup>6</sup> The Department will also help you apply for jobs.<sup>7</sup> The Department can help get short-term housing in a shelter, or transitional housing.<sup>8</sup> Transitional housing is a more long-term facility that may also provide some employment and educational services.

CORE is mandatory for all prisoners. Since all prisoners have to do CORE, you should not have to do anything special to do CORE programs. If you have any questions about the Department's reentry plan for you, you should speak to your transition specialist.<sup>9</sup>

## 2. Education and Skills Programs

Louisiana offers prisoners many ways to take educational classes and skills training programs. Participating in these programs may help you in your reentry. These programs can help you get more interesting, stable, or higher-paying jobs in the future. Also, the Parole Board may see you doing these programs as a positive factor when it decides whether you are eligible for parole.<sup>10</sup>

The Department is required to have educational and vocational training programs in each state prison.<sup>11</sup> Academic programs include literacy training, Adult Basic Education ("ABE"), GED ("General Equivalency Diploma") preparation, and special education. Course offerings are different at each state prison.

Unlike CORE, you have to ask to be in an education program.<sup>12</sup> Your prison will have rules about who can be in education programs.<sup>13</sup> Read the Appendix at the end of this Chapter for the rules at each prison. To take an education course, you usually have to show that you have above satisfactory (ok) behavior.<sup>14</sup> Above satisfactory behavior typically means a good disciplinary record.<sup>15</sup> You will be screened to determine which program is most appropriate for you.<sup>16</sup> If the program has a waiting list, prisoners who are closest to release will be put in the class first.<sup>17</sup> You should have had an orientation program when you

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<sup>5</sup> James LeBlanc, 2004 Innovation Awards Program Application: CORE 4, *available at* <http://www.csg.org/knowledgecenter/docs/innov/PSJFinalist2004-LA.pdf> (last visited Oct. 1, 2017).

<sup>6</sup> James LeBlanc, 2004 Innovation Awards Program Application: CORE 4-5, *available at* <http://www.csg.org/knowledgecenter/docs/innov/PSJFinalist2004-LA.pdf> (last visited Oct. 1, 2017).

<sup>7</sup> James LeBlanc, 2004 Innovation Awards Program Application: CORE 5, *available at* <http://www.csg.org/knowledgecenter/docs/innov/PSJFinalist2004-LA.pdf> (last visited Oct. 1, 2017).

<sup>8</sup> Telephone interview with Whalen Gibbs, Assistant Secretary, Louisiana Department of Corrections (Mar. 16, 2011).

<sup>9</sup> Telephone interview with Whalen Gibbs, Assistant Secretary, Louisiana Department of Corrections (Mar. 16, 2011).

<sup>10</sup> LA. ADMIN. CODE tit. 22, § 701(C)(4)(a) (2017) lists a prisoner's "attitude while incarcerated, including [his] participation in available programs" as a factor in the Parole Board's determination. Further, Louisiana requires that many parolees who do not already have a GED participate in adult educational programs while on parole, with costs paid by the parolee. Although this condition of parole may be suspended in some cases, there are many benefits to taking advantage of the educational programs offered while you are incarcerated. LA. REV. STAT. ANN. § 15:574.4 (2017) (effective November 1, 2017). For more information about parole in Louisiana, please refer to Chapter 21 of the *Louisiana State Supplement*.

<sup>11</sup> LA. REV. STAT. ANN. § 15:828(A)(1) (2017).

<sup>12</sup> Louisiana Department of Corrections: Education, *available at* <http://doc.la.gov/pages/reentry-initiatives/education/> (last visited Oct. 1, 2017).

<sup>13</sup> Louisiana Department of Corrections: Education, *available at* <http://doc.la.gov/pages/reentry-initiatives/education/> (last visited Oct. 1, 2017).

<sup>14</sup> Louisiana Department of Corrections: Education, *available at* <http://doc.la.gov/pages/reentry-initiatives/education/> (last visited Oct. 1, 2017).

<sup>15</sup> Telephone interview with Kim Barnett, Director of Educational Programs at the Department (Jan. 23, 2011).

<sup>16</sup> Louisiana Department of Corrections: Education, *available at* <http://doc.la.gov/pages/reentry-initiatives/education/> (last visited Oct. 1, 2017).

<sup>17</sup> Louisiana Department of Corrections: Education, *available at* <http://doc.la.gov/pages/reentry-initiatives/education/> (last visited Oct. 1, 2017).

first entered the prison.<sup>18</sup> That program listed all of that prison's educational offerings.<sup>19</sup> You should have been tested to decide which courses you can take.<sup>20</sup> Talk to your transition specialist if you would like to take a course or learn about available programs.<sup>21</sup>

Even if you can't take an educational program because of your behavior record, you might be able to do an independent study.<sup>22</sup> In addition, death row residents who may not be eligible to take courses at the prison may ask for academic information through a program.<sup>23</sup> They may also view educational broadcasts on TV.<sup>24</sup>

Residents of the Louisiana State Penitentiary, or Angola, may be able to assist with prison management at Angola or other facilities.<sup>25</sup> Prisoners who have completed a four-year degree in Theology may be able to be an assistant to a chaplain. Others may be able to be GED and literacy tutors for other prisoners. Prisoners may be able to transfer to another facility to be a chaplain's assistant or a tutor there.<sup>26</sup> If you have completed any four-year degree and you have earned a trade certification from the National Center for Construction Education and Research, you may be able to teach trade skills in prison. You may be able to transfer to another facility in the future to do this as well.<sup>27</sup>

Also, you may be able to earn "good-time" credit based on your work in educational programs, subject to the specific rules of each prison.<sup>28</sup> You usually can earn up to ten days of good-time credit for every month that you are a full-time student in the program, up to 180 days.<sup>29</sup>

Read the Appendix at the end of this Chapter for the list of the offerings at each state prison.

### 3. Non-educational Department offerings

#### a. Faith-Based Programs

Faith-based programs and educational opportunities are available to prisoners throughout Louisiana. All twelve state prisons broadcast religious TV 24 hours a day on the Trinity Broadcasting Network.<sup>30</sup> Several prisons, like Dixon Correctional Institute, Louisiana Correctional Institute for Women, and Rayburn Correctional Center, offer faith- and character-based dormitories (housing units). In these dormitories, prisoners of the same faith may be housed together.<sup>31</sup> Finally, prisoners in Angola can earn a two-year associate degree in Pastoral Ministries or a four-year bachelor's degree in Theology through the

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<sup>18</sup> Telephone interview with Kim Barnett, Director of Educational Programs at the Department (Jan. 23, 2011).

<sup>19</sup> Telephone interview with Kim Barnett, Director of Educational Programs at the Department (Jan. 23, 2011).

<sup>20</sup> Telephone interview with Kim Barnett, Director of Educational Programs at the Department (Jan. 23, 2011).

<sup>21</sup> Telephone interview with Whalen Gibbs, Assistant Secretary, Louisiana Department of Corrections (Mar. 16, 2011).

<sup>22</sup> Louisiana Department of Corrections: Education, *available at* <http://doc.la.gov/pages/reentry-initiatives/education/> (last visited Oct. 1, 2017).

<sup>23</sup> Louisiana Department of Corrections: Education, *available at* <http://doc.la.gov/pages/reentry-initiatives/education/> (last visited Oct. 1, 2017).

<sup>24</sup> Louisiana Department of Corrections: Education, *available at* <http://doc.la.gov/pages/reentry-initiatives/education/> (last visited Oct. 1, 2017).

<sup>25</sup> Louisiana Department of Corrections: Education, *available at* <http://doc.la.gov/pages/reentry-initiatives/education/> (last visited Oct. 1, 2017).

<sup>26</sup> Telephone interview with Whalen Gibbs, Assistant Secretary, Louisiana Department of Corrections (Mar. 16, 2011).

<sup>27</sup> Telephone interview with Whalen Gibbs, Assistant Secretary, Louisiana Department of Corrections (Mar. 16, 2011).

<sup>28</sup> Louisiana Department of Corrections: Education, *available at* <http://doc.la.gov/pages/reentry-initiatives/education/> (last visited Oct. 1, 2017).

<sup>29</sup> Louisiana Department of Corrections: Education, *available at* <http://doc.la.gov/pages/reentry-initiatives/education/> (last visited Oct. 1, 2017).

<sup>30</sup> Louisiana Department of Corrections: Values Development, *available at* <http://doc.la.gov/pages/reentry-initiatives/values-development/> (last visited Oct. 1, 2017).

<sup>31</sup> Louisiana Department of Corrections: Values Development, *available at* <http://doc.la.gov/pages/reentry-initiatives/values-development/> (last visited Oct. 1, 2017).

New Orleans Baptist Theological Seminary.<sup>32</sup> The Department of Corrections hopes that Angola residents serving life sentences will take advantage of this opportunity so they can be transferred to other prisons to help with religious programming.<sup>33</sup>

#### b. Substance Abuse Treatment

The Department of Corrections has many options for prisoners with a history of substance abuse. First, all state prisons offer programs, like Alcoholics Anonymous, Narcotics Anonymous, Dynamics of Addiction, Quitting Cocaine, and Relapse Prevention.<sup>34</sup> These programs are not mandatory. Still, they can help you with your reentry. The programs also are a positive factor when the Parole Board decides if you are eligible for parole.<sup>35</sup> Substance abuse education is also one part of the mandatory 100-hour CORE program.<sup>36</sup>

There are also two specialized substance abuse programs. The first is the Steven Hoyle Rehabilitation program, a three-month or longer program that focuses on therapy and changing your behaviors.<sup>37</sup> This program used to be located at the Forcht-Wade Correctional Center. However, that center was closed in July 2012, and the program is now located at the Bossier Parish Correctional Center.<sup>38</sup> The second is the Blue Walter Substance Abuse Treatment Program, located at the East Louisiana State Hospital in Jackson.<sup>39</sup> The program provides treatment to prisoners nearing release to help them get back into society.<sup>40</sup> Placement into these programs is limited. Placement is decided based on your substance abuse assessment. Prisoners with less time left in their sentences may be placed first.<sup>41</sup> You should speak to your transition specialist to request placement into a substance abuse program.<sup>42</sup>

### C. EMPLOYMENT

After you are released from prison, your criminal record may make it hard to get a job. This Part describes the problems that you may face and ways to solve those problems. Section 1 discusses Louisiana and federal laws that say whether public and private employers can deny you a job because of your criminal record. Section 2 gives information about how pardons and expungements affect your record, and if you have to give information about your prior arrests and convictions on a job application.

#### 1. Your Right to Employment

Louisiana treats people employed by the state (“public employees”) differently than people who are not employed by the state (“private employees”).<sup>43</sup> Usually, employers are allowed to consider your

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<sup>32</sup> Louisiana Department of Corrections: Values Development, *available at* <http://doc.la.gov/pages/reentry-initiatives/values-development/> (last visited Oct. 1, 2017).

<sup>33</sup> Louisiana Department of Corrections: Values Development, *available at* <http://doc.la.gov/pages/reentry-initiatives/values-development/> (last visited Oct. 1, 2017).

<sup>34</sup> Louisiana Department of Corrections: Substance Abuse Treatment, *available at* <http://doc.la.gov/pages/reentry-initiatives/substance-abuse-treatment/> (last visited Feb. 25, 2018).

<sup>35</sup> LA. ADMIN. CODE tit. 22, § 701(C)(4)(a) (2017) states that one factor in a parole determination will be “information concerning the offender’s attitude while incarcerated, including the offender’s participation in available programs and his overall compliance with institutional regulations.”

<sup>36</sup> Telephone interview with Whalen Gibbs, Assistant Secretary, Louisiana Department of Corrections (Mar. 16, 2011).

<sup>37</sup> Louisiana Department of Corrections: Substance Abuse Treatment, *available at* <http://doc.la.gov/pages/reentry-initiatives/substance-abuse-treatment/> (last visited Oct. 1, 2017).

<sup>38</sup> Reentry Programming, *available at* <http://doc.la.gov/reentry-programming/> (last visited Oct. 1, 2017).

<sup>39</sup> Louisiana Department of Corrections: Substance Abuse Treatment, *available at* <http://doc.la.gov/pages/reentry-initiatives/substance-abuse-treatment/> (last visited Oct. 1, 2017).

<sup>40</sup> Louisiana Department of Corrections: Substance Abuse Treatment, *available at* <http://doc.la.gov/pages/reentry-initiatives/substance-abuse-treatment/> (last visited Oct. 1, 2017).

<sup>41</sup> Telephone interview with Whalen Gibbs, Assistant Secretary, Louisiana Department of Corrections (Mar. 16, 2011).

<sup>42</sup> Telephone interview with Whalen Gibbs, Assistant Secretary, Louisiana Department of Corrections (Mar. 16, 2011).

<sup>43</sup> LA. REV. STAT. ANN. § 42:1414 (2017).

criminal records—including arrests not leading to conviction—when reviewing an application.<sup>44</sup> Private employers can make hiring decisions based on your criminal record. Public employers can use convictions in fewer ways.<sup>45</sup> Section C(1)(a) below discusses private employers. Section C(1)(b) discusses public employers.

#### a. Private Employers

Louisiana has laws about how state or local government agencies can use convictions when deciding to hire someone. Private employers do not have to follow the same rules.<sup>46</sup> Private employers can ask you about your criminal record, including convictions and even arrests not leading to a conviction. They may use this information to decide whether to hire you.<sup>47</sup> Louisiana doesn't have rules against employment discrimination by private employers because of a criminal record.<sup>48</sup>

The Equal Employment Opportunity Commission (“EEOC”), a federal agency, has found that employers’ blanket bans against hiring people with criminal records, both arrests and convictions, may violate Title VII of the Civil Rights Act of 1964. Title VII is a federal law that prohibits discrimination based on criminal records if the discrimination has a bad impact on a minority group.<sup>49</sup> Employers who wish to ban employment based on criminal records must show a “business necessity.” Employers can show business necessity by thinking about three factors:

- 1) The nature and gravity of the offense(s);
- 2) The amount of time since the conviction and/or completion of the sentence; and
- 3) The nature of the job held or sought.<sup>50</sup>

Title VII is limited to racial, gender, and religious minorities.<sup>51</sup> If you are a racial minority and believe that you were not hired for a position on the basis of your criminal record, you must file a Charge of Discrimination through the EEOC before you can file a lawsuit.<sup>52</sup> For information on how to file a charge, please visit <http://www.eeoc.gov/employees/howtofile.cfm> (last visited Feb. 9, 2018).

Private employers can use your convictions to decide whether to hire you. But both federal and state law prevents employers from discriminating because of your race, color, religion, sex, national origin,

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<sup>44</sup> State Profiles: Louisiana, *available at* <http://www.lac.org/roadblocks-to-reentry/main.php?view=profile&subaction1=LA> (last visited Oct. 1, 2017).

<sup>45</sup> LA. REV. STAT. ANN. § 42:1414 (2017).

<sup>46</sup> State Profiles: Louisiana, *available at* <http://www.lac.org/roadblocks-to-reentry/main.php?view=profile&subaction1=LA> (last visited Oct. 1, 2017).

<sup>47</sup> State Profiles: Louisiana, *available at* <http://www.lac.org/roadblocks-to-reentry/main.php?view=profile&subaction1=LA> (last visited Oct. 1, 2017).

<sup>48</sup> State Profiles: Louisiana, *available at* <http://www.lac.org/roadblocks-to-reentry/main.php?view=profile&subaction1=LA> (last visited Oct. 1, 2017).

<sup>49</sup> Pre-Employment Inquiries and Arrest and Conviction, *available at* [http://www.eeoc.gov/laws/practices/inquiries\\_arrest\\_conviction.cfm](http://www.eeoc.gov/laws/practices/inquiries_arrest_conviction.cfm) (last visited Oct. 1, 2017); *see also* *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290, 1295 (8th Cir. 1975) (finding that a bar on hiring applicants with any criminal convictions except for minor traffic offenses had a disparate impact on black applicants, who were more likely to have a criminal record, must be justified by establishing a business necessity). Federal courts in the Fifth Circuit have also followed the EEOC’s application of Title VII to discrimination based on a criminal record. *See, e.g.*, *Richardson v. Hotel Corp. of Am.*, 332 F. Supp. 519, 521 (E.D. La. 1971) (finding no Title VII violation where a business need existed for denying employment in a hotel to someone who had been convicted of theft).

<sup>50</sup> Policy Statement on Conviction Records (Feb. 4, 1987), *available at* [http://www.eeoc.gov/policy/docs/convict1.html#N\\_3\\_](http://www.eeoc.gov/policy/docs/convict1.html#N_3_) (last visited Oct. 1, 2017). For example, in *Richardson v. Hotel Corp. of Am.*, 332 F. Supp. 519, 521 (E.D. La. 1971), affirmed by the Fifth Circuit Court of Appeals in 1972, a federal district court held that a valid business need existed for a hotel to deny employment as a bellman—a “security sensitive” position—to applicants with “serious” criminal records. Therefore, the employer had not violated Title VII by firing the plaintiff upon discovery of his conviction for theft.

<sup>51</sup> 42 U.S.C. § 2000e-2(a) (2012) (“It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual . . . because of such individual’s race, color, religion, sex, or national origin . . .”).

<sup>52</sup> Employees & Job Applicants, *available at* <http://www.eeoc.gov/employees/index.cfm> (last visited Oct. 1, 2017).

age, disability, etc.<sup>53</sup> Therefore, you may still be able to file a Charge of Discrimination against an employer if he or she refuses to hire you based on any of these factors.

#### b. Public Employees

State law says that a public employee must be fired immediately upon being convicted of a felony.<sup>54</sup> The Louisiana Supreme Court later said that this law applies only to “unclassified” government employees, like elected officials, members of the military, members of government boards, commissions, and authorities, and teachers and educational staff.<sup>55</sup> If your conviction is later reversed, your firing will be considered illegal.<sup>56</sup>

State employees who are “classified” are not covered by this law.<sup>57</sup> Instead, classified employees can only be terminated (fired) for “cause.” The Civil Service Commission decides what counts as “for cause.”<sup>58</sup> If your employer started disciplinary action following your arrest or conviction, the employer must show that you did “conduct which impair[ed] the efficient or orderly operation of the public service”<sup>59</sup> in order to terminate (fire) you.<sup>60</sup>

When you are applying for a job, public employers can still deny your application. They can deny your application because of your criminal record. This is true even if you are qualified for the job, as long as your felony conviction “directly relates” to the job you applied for.<sup>61</sup> This is also true when you are applying for an occupational license, which may be denied for the same reason.<sup>62</sup> A “direct relationship” may include, for example, employment as a firefighter after a conviction for drunk driving, or a teacher of business ethics who was convicted of stealing money from a client.<sup>63</sup> Courts may choose to decide the “direct relationship” standard broadly. Still, there must be some connection between the employment you are seeking and the offenses on your criminal record before your criminal record can be the reason for not getting a job.<sup>64</sup> Talk to a lawyer if you were not hired at a state agency because of your criminal record and you think there is no relationship between your record and the job you applied for.

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<sup>53</sup> Employment Discrimination Act, LA. REV. STAT. ANN. §§ 23:301–23:369 (2017); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012); the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (2012); and the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111–12117 (2012).

<sup>54</sup> LA. REV. STAT. ANN. § 42:1414 (2017); LA. CONST. art. X, § 25.1.

<sup>55</sup> AFSCME, Council # 17 v. State, 01-0422, p. 1 (La. 06/29/01); 789 So. 2d 1263, 1265 (holding that a broad rule requiring classified employees, who are regulated by the executive branch, to be fired upon a felony conviction violated the constitutionally-mandated separation of powers between the different branches of the state government). *See* LA. CONST. Art. X, § 2 for a complete list of unclassified positions.

<sup>56</sup> Caldwell v. Caddo Levee Dist., 554 So. 2d 1245, 1248 (La. App. 1 Cir. 1989) (holding that a failure to consider the eventual result of the charges made the termination illegal).

<sup>57</sup> AFSCME, Council # 17 v. State, 01-0422, pp. 9–10 (La. 06/29/01); 789 So. 2d 1263, 1270 (finding LA. REV. STAT. ANN. § 42:1414 unenforceable when applied to classified employees).

<sup>58</sup> AFSCME, Council # 17 v. State, 01-0422, p. 9 (La. 06/29/01); 789 So. 2d 1263, 1269–1270.

<sup>59</sup> Louisiana Civil Service Rule 1.5.2.01.

<sup>60</sup> AFSCME, Council # 17 v. State, 01-0422, pp. 6–7 (La. 06/29/01); 789 So. 2d 1263, 1268 (discussing classified employees’ protections through the Civil Service Commission).

<sup>61</sup> LA. REV. STAT. ANN. § 37:2950 (2017).

<sup>62</sup> LA. REV. STAT. ANN. § 37:2950 (2017).

<sup>63</sup> Louisiana cases interpreting LA. REV. STAT. ANN. § 37:2950 are sparse. However, the state of New York employs a similar “direct relationship” standard in N.Y. Correction Law § 752, from which the above examples were taken; *Grafer v. New York City Civil Service Com.*, 581 N.Y.S.2d 337, 337 (N.Y. App. Div. 1992) and *Rosa v. City Univ. of New York*, 789 N.Y.S.2d 4, 5–6 (N.Y. App. Div. 2004).

<sup>64</sup> New York courts, for example, have tended to interpret the “direct relationship” standard broadly, permitting only a tenuous connection to exist between an applicant’s criminal record and the position for which he applied. *See, e.g.*, *Arrocha v. Bd. of Ed. of the City of New York*, 712 N.E.2d 669, 671, 672–673; 93 N.Y.2d 361, 364, 366–367; 690 N.Y.S.2d 503, 504–505, 506 (N.Y. 1999) (finding a direct relationship between a conviction for selling cocaine and a job as a high school teacher), and *Matter of the Assoc. of Surrogates & Supreme Court Reporters v. State of N.Y. Unified Court System*, 851 N.Y.S.2d 170 (App. Div. 2008) (upholding the denial of a job as a court reporter for a woman who had been convicted of identity theft).

Some state laws can prevent a person with a criminal record from getting certain jobs, like law enforcement positions, medical fields, teaching, and gaming.<sup>65</sup> Before you start training for a specialized field, you should make sure that your criminal history will not prevent you from getting a job in that field.

## 2. Clearing Your Criminal Record

Employers may ask you for information about your criminal record and may access your record. So it is really important to know what's on your criminal record. It is also useful to know how to clear your record so that future employers cannot access information about your previous offenses. Chapter 2 of this Supplement explains how to obtain your criminal record and how certain offenses may be expunged, which means removed from your record. Louisiana provides two other options for preventing employers from accessing your criminal record.

In addition to expungement, you might be able to receive a pardon. Pardons demonstrate rehabilitation (that you've changed for the better) since the commission of your offense. A pardon is not the same as an expungement: pardons do not clear the offense from your criminal record, but they do restore certain rights and benefits. Pardons make you eligible for more jobs, occupational licenses, or other benefits.<sup>66</sup> Pardons are automatically available to first-time offenders who were not previously convicted of a felony.<sup>67</sup> If you have more than one conviction, you may obtain a pardon *only* with permission from the Board of Pardons.<sup>68</sup> Only a full Governor's pardon, rather than the automatic pardon just described, can restore all of your rights, including those to occupational licenses.<sup>69</sup> To apply to the Board of Pardons, you must write down information about your conviction, when you were imprisoned, give information about yourself, the reason you are asking for the pardon, and what kind of relief you are requesting (what you want to happen).<sup>70</sup>

Finally, agencies and employers who are not in law enforcement cannot access information about your criminal record if: (1) you are at least sixty-one years old; (2) you were released from prison more than fifteen years ago; and (3) you have not been arrested since your release.<sup>71</sup> This means that potential employers will not be able to access your record if all three of these apply to you.

Even if your criminal record has been expunged or you have been pardoned, you may still have to talk about prior arrests or convictions on a job application. The federal government doesn't let employers ask about arrests that did not lead to conviction. But Louisiana state law does not stop the practice.<sup>72</sup> If you do not disclose the arrests and your employer learns of them during a background check, you may lose your job for lying on the application.<sup>73</sup> It's hard to know what to disclose on a job application, so you

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<sup>65</sup> See, e.g., La. Atty. Gen. Op. No. 1995-259 (July 14, 1995) (finding LA. REV. STAT. § 37:2950 overcome by a more recent regulation prohibiting the employment of any teacher with a criminal conviction or nolo contendere plea); *Eicher v. La. State Police, Riverboat Gaming Enforcement Div.* 97-0121, p. 10 (La. App. 1 Cir. 02/20/98); 710 So. 2d 799, 806 (finding that the Riverboat Gaming Enforcement Division did not abuse its discretion when it based the denial of a work permit to a gaming employee on her criminal history).

<sup>66</sup> Criminal Record Expungement in Louisiana, *available at* <http://www.lawhelp.org/la/> (last visited Oct. 5, 2017) (Follow "Employment" hyperlink; then follow "Criminal Records" hyperlink; then follow "Criminal Record Expungement in Louisiana" hyperlink.).

<sup>67</sup> LA. REV. STAT. ANN. §15:572 (2017).

<sup>68</sup> LA. REV. STAT. ANN. §15:572 (2017).

<sup>69</sup> Criminal Record Expungement in Louisiana, *available at* <http://www.lawhelp.org/la/> (last visited Oct. 5, 2017) (Follow "Employment" hyperlink; then follow "Criminal Records" hyperlink; then follow "Criminal Record Expungement in Louisiana" hyperlink.).

<sup>70</sup> For specific information on what your clemency application should include, and to receive an application, call the Board of Pardons at 225-342-5421.

<sup>71</sup> LA. REV. STAT. ANN. § 15:586 (2017).

<sup>72</sup> Criminal Record Expungement in Louisiana, *available at* <http://www.lawhelp.org/la/> (last visited Oct. 5, 2017) (Follow "Employment" hyperlink; then follow "Criminal Records" hyperlink; then follow "Criminal Record Expungement in Louisiana" hyperlink.).

<sup>73</sup> Criminal Record Expungement in Louisiana, *available at* <http://www.lawhelp.org/la/> (last visited Oct. 5, 2017) (Follow "Employment" hyperlink; then follow "Criminal Records" hyperlink; then follow "Criminal Record Expungement in Louisiana" hyperlink.).



should talk to a lawyer if you got a pardon or expungement and you don't know if you should tell an employer about your conviction on a job application.

#### D. YOUR ELIGIBILITY FOR OTHER BENEFITS

Your criminal record may affect whether you can get public housing or other types of financial assistance. This Part discusses how your criminal record may affect your right to these benefits. Section 1 covers public housing programs. Section 2 talks about unemployment benefits if you lost your job because of your criminal conviction. Section 3 is about whether you can get financial assistance, including cash assistance, Food Stamps, medical coverage, and Social Security.

##### 1. Public Housing

Public housing programs are regulated by the federal government and run by local agencies. Your criminal record may affect whether you can get reduced-cost housing. The Housing Choice Voucher Program (Section 8), requires residents to cover a small part of rent and gives residents vouchers to cover the rest of the rent. The federal government bans admission to Section 8 housing for any applicant who is subject to a lifetime sex-offender registration requirement.<sup>74</sup> You also can't get Section 8 housing for three years if you were evicted, or a household member was evicted, from public housing for drug-related criminal activity.<sup>75</sup>

The local housing authority can (but isn't required to) deny applicants on the basis of drug-related, violent, or other criminal activity that may threaten the health, safety, or right to peaceful enjoyment by other people living in the area.<sup>76</sup> The agency can decide if it wants to deny applicants with recent criminal records.<sup>77</sup> The Housing Authority of New Orleans, for example, does not allow people convicted of crimes that threaten the public health, safety, or welfare to apply for housing for three years after the conviction.<sup>78</sup> Contact your local housing authority to see if your criminal record will stop you from taking advantage of public housing. If the agency denies your admission to public housing because of your criminal record and you believe this was wrong because: 1) the criminal record the agency reviewed was inaccurate, or 2) the offense(s) on your record aren't enough to deny you housing according to the agency's own rules, you can challenge this decision in an informal review procedure.<sup>79</sup>

For information on how to apply for public housing and income eligibility requirements, contact your local housing authority.<sup>80</sup>

##### 2. Unemployment Benefits

If you were fired from your job because of your criminal conviction, you may not be able to get unemployment benefits.<sup>81</sup> Louisiana law stops a person from getting benefits if he was fired from his job

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<sup>74</sup> 24 C.F.R. § 982.553(a)(2)(i) (2018).

<sup>75</sup> 24 C.F.R. § 982.553(a)(1)(i) (2018).

<sup>76</sup> 24 C.F.R. § 982.553(a)(2)(ii)(A) (2018).

<sup>77</sup> 24 C.F.R. § 982.553(a)(2)(ii)(B) (2018). The Code of Federal Regulations (C.F.R.) allows each local housing agency to decide how recent an applicant's criminal record must be in order to be the basis of an admission denial, within a "reasonable time." The Housing Authority of New Orleans has interpreted this standard as within three years of your application for public housing.

<sup>78</sup> State Profiles: Louisiana, *available at* <http://www.lac.org/roadblocks-to-reentry/main.php?view=profile&subaction1=LA> (last visited Feb. 25, 2018).

<sup>79</sup> 24 C.F.R. § 982.553(d)(1) (2018). *See* 24 C.F.R. § 982.554 (2018) for more information on the informal review process. The specific procedure will vary according to each agency, so you should contact your local housing authority to find out how to request review of the denial. There are often deadlines for requesting review of an agency decision, so it is important to do this as soon as possible upon finding out that your application has been denied.

<sup>80</sup> For a list of local housing agencies in Louisiana, *see* PHA Contact Info, *available at* [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/pha/contacts/la](https://www.hud.gov/program_offices/public_indian_housing/pha/contacts/la) (last visited Oct. 11, 2017).

<sup>81</sup> LA. REV. STAT. ANN. § 23:1601(2)(a) (2017).

for “misconduct connected with his employment.”<sup>82</sup> Your employer, however, has to prove that there was misconduct (that you did something wrong).<sup>83</sup> Louisiana courts, on the other hand, have found that any felony conviction is enough misconduct to stop you from getting unemployment benefits.<sup>84</sup> If that misconduct was “connected with [your] employment,” it will disqualify you from receiving unemployment benefits.<sup>85</sup>

Conduct leading to a felony conviction that occurred during work hours or related to your work will likely be treated as “connected with your employment.”<sup>86</sup> The courts have held that off-the-job activities will also disqualify you if they “render [you] . . . unable to report for work and perform the duties of [your] employment for any unseasonable length of time by reason of [your] confinement in jail.”<sup>87</sup> In other words, anything you do outside of work may also count against you. If you lost your job for not being able to physically perform your duties because you were locked up, you might not be able to get unemployment benefits. However, the unemployment agency must conduct a case-by-case analysis to decide if a person gets unemployment benefits.<sup>88</sup> The agency will also look at whether you violated one of your employer’s policies by the conduct associated with your conviction.<sup>89</sup>

For former employees of the state or city, the rules are simpler. Under state law, public employees who were fired because of their felony conviction will be automatically disqualified from receiving unemployment compensation.<sup>90</sup>

If you believe that you should be getting unemployment benefits, you can apply for benefits by calling 1-866-783-5567 or by visiting the Louisiana Workforce Commission website. The website contains information about how to estimate how much you will receive in benefits, what information you will need to file a claim, how to do so, and how to check on the status of your application.<sup>91</sup>

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<sup>82</sup> LA. REV. STAT. ANN. § 23:1601(2)(a) (2017). Misconduct is defined as “mismanagement of a position of employment by action or inaction, neglect that places in jeopardy the lives or property of others, dishonesty, wrongdoing, violation of a law, or violation of a policy or rule adopted to insure orderly work or the safety of others.”

<sup>83</sup> See *Daniel v. Wal-Mart Assoc.*, 2003-0441, p. 6 (La. App. 1 Cir. 12/31/03); 868 So. 2d 137, 141 (finding that the lower court erred in placing the burden on the plaintiff to prove that he had not been fired for misconduct).

<sup>84</sup> *Grimble v. Brown*, 247 La. 376, 382, 171 So. 2d 653, 655 (La. 1965) (stating “it can hardly be gainsaid that the commission of an act constituting a criminal offense . . . is misconduct.”).

<sup>85</sup> *Morris v. Gerace*, 353 So. 2d 986, 988 (La. 1977) (establishing that misconduct must be employment related).

<sup>86</sup> LA. REV. STAT. ANN. § 23:1601 (2017).

<sup>87</sup> *Grimble v. Brown*, 247 La. 376, 383 (La. 1965).

<sup>88</sup> *Moore v. Louisiana State Univ.*, 517 So. 2d 993, 994 (La. App. 3 Cir. 1987) (holding that although not every criminal action committed while off-duty would warrant the denial of unemployment benefits, the circumstances of the case at hand did).

<sup>89</sup> See *Sensley v. Administrator, Office of Employment Sec.*, 552 So. 2d 787, 790 (La. App. 1 Cir. 1989) (finding that plaintiff was not qualified for benefits after being terminated from a management position at McDonald’s following an arrest for drug possession and intent to distribute at his home, because he had violated the employer’s policy that managers must set a positive example for the family-style environment); *South Central Bell Telephone Co. v. Sumrall*, 414 So. 2d 876, 878 (La. 1982) (upholding denial of employment benefits when plaintiff had been terminated for violating the company’s policy against drug use while on or off duty following arrest on drug charges); *Johnson v. Bd. of Com’rs of Port of New Orleans*, 348 So. 2d 1289, 1292 (La. App. 4 Cir. 1977) (finding plaintiff disqualified from unemployment compensation after his conviction for disturbing the peace violated three explicit employer policies). But see *Marine Drilling Co. v. Whitfield*, 535 So. 2d 1253, 1257 (La. App. 3 Cir. 1988) (allowing unemployment compensation due to the lack of connection between the plaintiff’s positive drug test while off-duty and his employment on a drilling rig).

<sup>90</sup> *Moore v. Louisiana State Univ.*, 517 So. 2d 993, 994 (La. App. 3 Cir. 1987) (finding that the state properly denied benefits to plaintiff, who had been fired from his job in maintenance at a state university due to a felony conviction that he had received while on unpaid leave during the summer, which the court described as “a felony done in complete disregard of the standards of behavior of the employer”). The court in *Moore* relied on LA. REV. STAT. ANN. § 42:1414, which provides for complete termination of the employer-employee relationship, including for purposes of benefits, when a state employee receives a felony conviction.

<sup>91</sup> Unemployment Insurance: Claimants’ Menu, available at [http://www.laworks.net/UnemploymentInsurance/UI\\_Claimants.asp](http://www.laworks.net/UnemploymentInsurance/UI_Claimants.asp) (last visited Oct. 5, 2017).

### 3. Public Assistance

#### a. Temporary Assistance for Needy Families (TANF) and Food Stamps (SNAP)

Temporary Assistance for Needy Families (“TANF”) is a federal welfare program that gives cash assistance to certain families for a short period of time.<sup>92</sup> In Louisiana, this program is the main form of welfare, and is known as the Family Independent Temporary Assistance Program (“FITAP”).<sup>93</sup> The Supplemental Nutrition Assistance Program (“SNAP,” more commonly known as Food Stamps) gives extra money to pay for food.<sup>94</sup>

The federal government recently limited who can get TANF and SNAP. The federal government created a lifetime ban on these benefits for anyone convicted of a drug offense.<sup>95</sup> However, Louisiana has chosen to “opt out” of the lifetime ban.<sup>96</sup> Instead, individuals convicted of a drug offense in Louisiana cannot receive FITAP and SNAP benefits for one year.<sup>97</sup>

You can apply or reapply for FITAP or SNAP benefits by filling out an online form.<sup>98</sup> You can also download the form, fill it out by hand, and return it to your local Office of Family Support (“OFS”).<sup>99</sup> OFS will then interview you, either in person or over the phone, and make a decision about your eligibility.<sup>100</sup>

#### b. Medicaid

Medicaid is a state program that provides medical insurance and services for low-income individuals.<sup>101</sup> Louisiana residents who receive FITAP or Supplemental Security Insurance (*see* Section 3(c) below for more information about SSI) are automatically able to get Medicaid.<sup>102</sup> You also might be able to get Medicaid if you are blind, disabled, or a parent of a child under age 19.<sup>103</sup>

Your criminal record will not affect whether you can get Medicaid. If you got Medicaid benefits before prison, you will have to reapply when you are released to get back into the program.<sup>104</sup> If you want to apply or reapply for Medicaid, contact the Louisiana Medicaid hotline at 1-888-342-6207 to begin the process over the phone.

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<sup>92</sup> Policy Basics: An Introduction to TANF, Center on Budget and Policy Priorities, *available at* <http://www.cbpp.org/cms/?fa=view&id=936> (last visited Oct. 5, 2017).

<sup>93</sup> Family Independence Temporary Assistance Program, Louisiana Department of Children and Family Services, *available at* <http://www.dss.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&nid=109&pnid=7&pid=139&catid=0> (last visited Oct. 5, 2017).

<sup>94</sup> Supplemental Nutrition Assistance Program, U.S. Dep’t. of Agriculture Food and Nutrition Service, *available at* <http://www.fns.usda.gov/snap/> (last visited Oct. 5, 2017).

<sup>95</sup> Summary of State Laws Modifying the Federal Ban on TANF and Food Stamps, *available at* [http://www.lac.org/toolkits/TANF/TANF\\_summary.htm](http://www.lac.org/toolkits/TANF/TANF_summary.htm) (last visited Oct. 5, 2017).

<sup>96</sup> Summary of State Laws Modifying the Federal Ban on TANF and Food Stamps, *available at* [http://www.lac.org/toolkits/TANF/TANF\\_summary.htm](http://www.lac.org/toolkits/TANF/TANF_summary.htm) (last visited Oct. 5, 2017).

<sup>97</sup> Summary of State Laws Modifying the Federal Ban on TANF and Food Stamps, *available at* [http://www.lac.org/toolkits/TANF/TANF\\_summary.htm](http://www.lac.org/toolkits/TANF/TANF_summary.htm) (last visited Oct. 5, 2017).

<sup>98</sup> The form is available at the following website: <https://cafe-cp.dcsf.la.gov/selfservice/> (last visited Jan. 23, 2018).

<sup>99</sup> Louisiana CAFÉ Customer Portal, *available at* <https://cafe-cp.dcsf.la.gov/selfservice/> (last visited October 5, 2017).

<sup>100</sup> Frequently Asked Questions, *available at* [https://cafe-cp.dcsf.la.gov/en\\_robohelp/CafeCustomerPortal.htm#ACFAQ.htm/](https://cafe-cp.dcsf.la.gov/en_robohelp/CafeCustomerPortal.htm#ACFAQ.htm/) (last visited Oct. 5, 2017).

<sup>101</sup> Common Questions—Medicaid, *available at* <http://www.dhh.louisiana.gov/index.cfm/faq/category/72> (last visited Oct. 5, 2017).

<sup>102</sup> Common Questions—Medicaid, *available at* <http://www.dhh.louisiana.gov/index.cfm/faq/category/72> (last visited Feb. 25, 2018).

<sup>103</sup> Common Questions—Medicaid, *available at* <http://www.dhh.louisiana.gov/index.cfm/faq/category/72> (last visited Oct. 5, 2017).

<sup>104</sup> Telephone interview with a representative from the Louisiana Medicaid Hotline (Jan. 23, 2011).

c. Federal benefits

The Social Security Administration (“SSA”) offers several benefits programs that you may be able to take advantage of. If you are disabled and have never worked, you may qualify for Supplemental Security Income, or “SSI.”<sup>105</sup> If you are disabled and have a significant work history, you may be able to get benefits through Social Security Disability.<sup>106</sup> If you are over 62 and have a significant (big) work history, you should be able to get Social Security Retirement benefits.<sup>107</sup> The SSA also gives Medicare, a medical insurance program for people with disabilities or people who are age 65 or older.<sup>108</sup>

The Social Security Administration does not deny benefits to applicants with criminal records.<sup>109</sup> If you got Social Security Disability or Retirement benefits before prison, they can be reinstated (you get the benefits again) the month after your release if you contact Social Security and provide a copy of your release documents.<sup>110</sup> If you got SSI benefits and were in prison for longer than 12 months, however, your benefits will be terminated (end) and you must reapply when you are released.<sup>111</sup> Your institution may have a pre-release agreement with the SSA. If so, you can apply for benefits before you are released.<sup>112</sup> If not, contact the SSA to apply when you know your release date.<sup>113</sup>

Your Medicare coverage also may have been terminated (ended) while you were in prison. Medicare Part B (medical insurance) requires you to pay a monthly premium that you may not have paid during your sentence. If that is the case, you must reapply during the general enrollment period of January through March of each year.<sup>114</sup>

Prior to 2009, the SSA suspended (stopped) Social Security benefits for anyone who got Social Security benefits and had a felony warrant for his arrest.<sup>115</sup> Now, however, the SSA may only suspend your benefits if you have an open bench warrant for a probation or parole violation,<sup>116</sup> or if you are currently in prison. Once you are released, you should be careful not to violate your probation or parole because your Social Security benefits may be terminated.

4. Other Restrictions to Reentry

a. Voting

The Louisiana State Constitution provides that individuals with criminal records can vote unless they are currently in prison for a felony.<sup>117</sup> Once you are released, your right to vote will be automatically restored (you’ll be able to vote again).

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<sup>105</sup> See Supplemental Security Income (SSI) Benefits, *available at* <http://www.socialsecurity.gov/pgm/ssi.htm> (last visited Oct. 1, 2017). Please visit [www.ssa.gov](http://www.ssa.gov) for more information about this program.

<sup>106</sup> See Disability Benefits, *available at* <http://www.socialsecurity.gov/pgm/disability.htm> (last visited Oct. 1, 2017). Please visit [www.ssa.gov](http://www.ssa.gov) for more information about this program.

<sup>107</sup> See Retirement Planner, *available at* <http://www.socialsecurity.gov/pgm/retirement.htm> (last visited Oct. 1, 2017). Please visit [www.ssa.gov](http://www.ssa.gov) for more information about this program.

<sup>108</sup> See Medicare Benefits, *available at* <http://www.socialsecurity.gov/pgm/medicare.htm> (last visited Oct. 1, 2017). Please visit [www.ssa.gov](http://www.ssa.gov) for more information about this program.

<sup>109</sup> See What Prisoners Need to Know, *available at* <http://ssa.gov/pubs/10133.html#3> (last visited Oct. 1, 2017).

<sup>110</sup> See What Prisoners Need to Know, *available at* <http://ssa.gov/pubs/10133.html#3> (last visited Oct. 1, 2017).

<sup>111</sup> See What Prisoners Need to Know, *available at* <http://ssa.gov/pubs/10133.html#3> (last visited Oct. 1, 2017).

<sup>112</sup> See What Prisoners Need to Know, *available at* <http://ssa.gov/pubs/10133.html#3> (last visited Oct. 1, 2017).

<sup>113</sup> See What Prisoners Need to Know, *available at* <http://ssa.gov/pubs/10133.html#3> (last visited Oct. 1, 2017). You can reach the SSA to apply for benefits by phone at 1-800-772-1213 or online at [www.ssa.gov](http://www.ssa.gov).

<sup>114</sup> See What Prisoners Need to Know, *available at* <http://ssa.gov/pubs/10133.html#3> (last visited Oct. 1, 2017). You can apply for Medicare online at <https://secure.ssa.gov/iClaim/rib>, or contact the SSA over the phone at 1-800-772-1213.

<sup>115</sup> See Notice of Final Settlement in Martinez Court Case, *available at* <http://www.ssa.gov/martinezsettlement/> (last visited Oct. 1, 2017).

<sup>116</sup> See Notice of Final Settlement in Martinez Court Case, *available at* <http://www.ssa.gov/martinezsettlement/> (last visited Oct. 1, 2017).

<sup>117</sup> LA. CONST. art. I, §§10, 20

### b. Drivers Licenses and State Identification Cards

If you were convicted of a crime or another type of offense involving narcotics, your drivers license will have been automatically revoked for at least ninety days, but no more than one year.<sup>118</sup> If you are in prison for less than a year because of a drug offense, you should still check with the Office of Motor Vehicles to make sure that your license is still valid.<sup>119</sup>

In some cases, the Department may grant you a restricted (limited) license if you can show that the suspension of your license will result in a hardship.<sup>120</sup> Hardship means that not having a license would prevent you from earning a livelihood (working).<sup>121</sup> If you don't get the result you want from the Department, you may file a petition to have the district court in your parish review the decision.<sup>122</sup> Generally, the Department or the court grants restricted licenses for education or employment purposes.<sup>123</sup> In one case, for example, the court allowed a restricted license after the plaintiff showed that driving a vehicle was "absolutely necessary . . . to perform his job assignments" and that without the job he would be unable to support his family.<sup>124</sup>

If you need a state identification card, the Department can help you obtain one as part of the Corrections Organized for Reentry program.<sup>125</sup> Working with the Office of Motor Vehicles, the Department headquarters in Baton Rouge can print state IDs for prisoners preparing for release.<sup>126</sup> If you think you may need a new state identification card, you should talk to your transition specialist. If you do not have enough money in your account to pay for the card, the Department will pay for it.<sup>127</sup>

## E. CONCLUSION

The Louisiana Department of Corrections offers many pre-release programs to help you transition back into society. This includes academic and vocational classes, substance abuse treatment, and job preparation. Louisiana law regarding employment for applicants with criminal records is not very good for you. You should be careful about your career choices to make sure that your criminal record will not stop you from getting a job. Finally, your criminal record should not stop you from getting most types of public benefits, including Social Security and Medicaid.

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<sup>118</sup> LA. REV. STAT. ANN. § 32:430(A)(1) (2017).

<sup>119</sup> Information about license suspension or disqualification can be obtained over the phone by calling (225) 925-6146; select option 1 and have your Louisiana driver's license number available.

<sup>120</sup> LA. REV. STAT. ANN. § 32:668(B)(1)(a) (2017).

<sup>121</sup> LA. REV. STAT. ANN. § 32:668 (2017).

<sup>122</sup> LA. REV. STAT. ANN. § 32:668(C) (2017); LA. REV. STAT. ANN. § 32:415.1(A)(1) (2017).

<sup>123</sup> LA. REV. STAT. ANN. § 32:668 (2017).

<sup>124</sup> *Noustens v. State of Louisiana*, 524 So. 2d 235, 237 (La. App. 5 Cir. 1988). Note that although the court issued a restricted license to the plaintiff immediately because suspension of his license would result in the loss of his job, some courts have declined to follow *Noustens* and instead require a waiting period of 30 to 90 days before issuing a hardship license. See *Schott v. State of Louisiana*, 556 So. 2d 999, 1001 (La. App. 3 Cir. 1990) (finding that the plaintiff must wait 90 out of the 180 days of his sentence before receiving a restricted license).

<sup>125</sup> See James LeBlanc, 2004 Innovation Awards Program Application: CORE, available at <http://www.csg.org/knowledgecenter/docs/innov/PSJFinalist2004-LA.pdf> (last visited Oct. 1, 2017).

<sup>126</sup> Telephone interview with Whalen Gibbs, Assistant Secretary, Louisiana Department of Corrections (Mar. 16, 2011).

<sup>127</sup> Telephone interview with Whalen Gibbs, Assistant Secretary, Louisiana Department of Corrections (Mar. 16, 2011).

## APPENDIX A

### EDUCATIONAL AND SKILLS TRAINING OFFERINGS AT EACH PRISON

#### *Louisiana State Penitentiary*<sup>128</sup>

The State Penitentiary offers academic classes in Literacy, Adult Basic Education (“ABE”), GED Preparation, and Special Education. Depending on your score on the Test for Adult Basic Education (“TABE”), you may take the following vocational courses through Louisiana Technical College: Automotive Technology, Carpentry, Collision Repair, Culinary Arts, Electrical, Horticulture, and Welding. You may also enroll at the New Orleans Baptist Theological Seminary to obtain an Associate’s or a Bachelor’s degree in Christian Ministry, or a Faith-based Certificate. The State Penitentiary also offers Pre-Release Exit Programs and Reentry Programs that train prisoners in employment and other skills to help with your daily life upon release.

#### *Louisiana Correctional Institute for Women*<sup>129</sup>

In addition to Literacy, ABE, and GED classes, prisoners can also take courses in Culinary Arts, Horticulture, Business Office Technology, and Upholstery. The reentry programs offered include anger management, sexual trauma and domestic violence support groups, parenting, and organizations such as Toastmasters and the Jaycees, a leadership and civic awareness group.

#### *Allen Correctional Center*<sup>130</sup>

Allen Correctional Center offers GED, ABE, Literacy, and special education classes, as well as peer tutoring through the Correctional Learning Network. Vocational offerings include Culinary Arts, Upholstery, Cabinet Making, and Computerized Office Practice. The Correctional Center has a wide range of substance abuse programming, values development, and theological courses and groups. Finally, the pre-release programming includes a Life Plan seminar and a wilderness program.

#### *Avoyelles Correctional Center*<sup>131</sup>

Vocational offerings at Avoyelles include Auto Collision Repair, Engine Technology, Barbering, Culinary Arts, Building Technology, Diesel Engine Repair, and Masonry. Certain first-time offenders may take entry-level college courses through the Youth Offender Program. Other college level courses are available through correspondence at your own expense.

#### *David Wade Correctional Center*<sup>132</sup>

David Wade offers vocational programs in Air Conditioning and Refrigeration, Automotive, Carpentry, Horticulture, and Welding. Prisoners between 16 and 25 years old who have obtained their GED or high school diploma and who are within five years of release may pursue postsecondary education through a Youth Offender Grant. Religious programs and services are available, along with the mandatory reentry programming.

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<sup>128</sup> See Education, available at <http://doc.la.gov/education> (last visited Oct. 1, 2017).

<sup>129</sup> See Education, available at <http://doc.la.gov/education> (last visited Oct. 1, 2017).

<sup>130</sup> See Education, available at <http://doc.la.gov/education> (last visited Oct. 1, 2017).

<sup>131</sup> Education, available at <http://doc.la.gov/education> (last visited Feb. 25, 2018).

<sup>132</sup> Education, available at <http://doc.la.gov/education> (last visited Feb. 25, 2018).

***Dixon Correctional Institute***<sup>133</sup>

In addition to GED, ABE, and Literacy classes, Dixon offers vocational courses in Collision Repair, Carpentry, Automotive Technology, and Welding. College courses are available through correspondence, and Dixon offers the standard pre-release, religious, and substance abuse programming. You may also participate in offender organizations such as Toastmasters and Incarcerated Veterans.

***Elayn Hunt Correctional Center***<sup>134</sup>

Vocational offerings at Elayn Hunt include Welding, Automotive Technology, Carpentry, Air Conditioning and Refrigeration, and Outdoor Power Equipment Technology. You can also earn certifications in areas such as Construction, Heating, Ventilation, and Air-Conditioning from the Environmental Protection Agency ("HVAC/EPA"), and Small Engine Technicians.

***B.B. Rayburn Correctional Center***<sup>135</sup>

B.B. Rayburn offers vocational courses in welding, automotive, and building technology, as well as a six-month course in Job/Life Skills that teaches computer literacy, typing, resume formulation, and job search skills. Prisoners may also work toward an Associate Degree in General Studies with a concentration in business or religion through the River Parish Community College.

***Winn Correctional Center***<sup>136</sup>

Winn offers the standard ABE, GED, and literacy courses in addition to vocational classes in Computerized Office Practice, Culinary Arts/Food Service, Data Entry, HVAC, Horticulture, Graphic Arts, Automotive Body & Maintenance Repair, and Welding.

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<sup>133</sup> Education, *available at* <http://doc.la.gov/education> (last visited Feb. 25, 2018).

<sup>134</sup> Education, *available at* <http://doc.la.gov/education> (last visited Feb. 25, 2018).

<sup>135</sup> Education, *available at* <http://doc.la.gov/education> (last visited Feb. 25, 2018).

<sup>136</sup> Education, *available at* <http://doc.la.gov/education> (last visited Feb. 25, 2018).

# CHAPTER 23

## INFECTIOUS DISEASES: HIV/AIDS, TUBERCULOSIS, HEPATITIS, AND MRSA IN PRISON

### A. INTRODUCTION

This Chapter explains your legal rights concerning infectious diseases in Louisiana prisons and jails. You should also refer to Chapter 26 of the main *JLM* for more information on your rights under the U.S. Constitution, as well as for general information on HIV, AIDS, tuberculosis (TB), hepatitis B, hepatitis C, and methicillin-resistant staphylococcus aureus (MRSA, or “staph”). Chapter 26 of the main *JLM* also explains related federal laws, which govern federal prisons.

Part B of this chapter provides background information on infectious diseases. Part C briefly explains your constitutional rights concerning medical treatment. Part D explains your legal rights concerning involuntary and voluntary testing for infectious diseases. Part E discusses your rights and the prevention of infectious diseases, including segregation. Part F explains your rights to confidentiality and Part G outlines your rights to medical treatment. Part H outlines the laws about discrimination and infectious diseases. Finally, Part I contains information on sentencing and infectious diseases.

You should also read other Chapters of the main *JLM* to understand your legal rights, especially Chapter 16, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law,” Chapter 36, “Special Considerations for Sex Offenders,” Chapter 28, “Rights of Prisoners with Disabilities,” Chapter 23, “Your Right to Adequate Medical Care,” and Chapter 35, “Getting Out Early: Conditional & Early Release.”

There are more court cases about HIV/AIDS than about tuberculosis, hepatitis B, hepatitis C, and MRSA. Judges always look at the specific facts of each case, so you should try to find cases about your disease. If you cannot find cases about your disease, you can also try to show how your disease is similar to HIV/AIDS or another disease that a case talks about. Infectious diseases are very similar, including how they are spread and their effects on prisoners. For example, if you want to use a case about AIDS and argue the law should also apply to hepatitis C, you should try to explain clearly why hepatitis C is similar to AIDS.

This Chapter is only a summary of the many issues about infectious diseases in the prison system. You will probably have to do more research elsewhere. This Chapter only includes HIV/AIDS, tuberculosis, hepatitis (the most common infectious diseases in prison), and MRSA, but there are many other diseases. Scientists are always discovering new information about infectious diseases, so some of this information may not be correct in the future.

### B. BACKGROUND INFORMATION ON INFECTIOUS DISEASES

#### 1. HIV and AIDS

HIV, the Human Immunodeficiency Virus, is the virus that causes AIDS.<sup>1</sup> AIDS stands for Acquired Immunodeficiency Syndrome. Over time, the HIV virus weakens your immune system so your body cannot fight off infection properly. You may develop various infections—known as “opportunistic” infections—that take advantage of your body because HIV has weakened it.<sup>2</sup>

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<sup>1</sup> See Centers for Disease Control & Prevention, HIV Basics, *available at* <http://www.cdc.gov/hiv/basics/index.html> (last visited Oct. 1, 2017). The *JLM* knows that many prisoners do not have access to the Internet, but because we want this information to be up-to-date, we cite frequently to different agencies’ and organizations’ Internet websites.

<sup>2</sup> See Centers for Disease Control and Prevention: Living with HIV, *available at* <http://www.cdc.gov/hiv/living/index.html> (last visited Oct. 1, 2017).



Left untreated, on average, HIV develops into AIDS within ten years.<sup>3</sup> How long it takes for HIV to develop into AIDS is different for each person. Medical treatments can slow down how fast HIV weakens your body.<sup>4</sup> As HIV gets worse and becomes AIDS, people become sick with other serious illnesses and infections.

Being HIV-positive *does not* mean that you have AIDS. It is very important that you consult a doctor to find out if you are infected with HIV or if you have developed AIDS so that you can get the proper medical treatment. Getting tested is the only way you can know for certain if you are infected.

HIV is most commonly spread in these ways: 1) by having unprotected anal, vaginal, or oral sex with a person with HIV; 2) by sharing needles or injection equipment with a drug user who has HIV; 3) from an HIV-infected mother to her baby, before or during birth or through breast-feeding;<sup>5</sup> and 4) through unsanitary tattooing or body piercing procedures.<sup>6</sup>

*You cannot get HIV by working with or being around someone who has HIV, or by sharing a cell with another prisoner who is HIV-positive.* You also cannot get HIV from sweat, spit, tears, clothes, drinking fountains, telephones, toilet seats, or through everyday activities like sharing a meal. HIV is also not transmitted through insect bites or stings, donating blood, or through kissing.

If you do not have HIV (are “HIV-negative”), you can help avoid getting HIV by taking the following steps:

- 1) Never share needles or syringes if you inject drugs or get a tattoo or body piercing.
- 2) Do not share equipment used to prepare and inject drugs (“works”).
- 3) Use a latex condom—not a lambskin condom—every time you have sex, including anal and oral sex.
- 4) Never share razors or toothbrushes because of the risk of contact with someone else’s blood.

Following these rules can help protect you from getting HIV.

a. Women and HIV/AIDS

Symptoms of HIV are often different for women than for men. Early signs for a woman with HIV include gynecological disorders, especially pelvic inflammatory disease (“PID”), infections causing unusual pap smears (cervical dysplasia), and chronic yeast infections.<sup>7</sup> Women with HIV also have a higher risk of getting cervical cancer.<sup>8</sup> If you have HIV, you should get a complete gynecological exam, including an inspection of the cervix (colposcopy), and a pap smear every six months to find any problems early. If you believe you may have HIV or AIDS, try to get tested.

Appendix A includes several organizations and sources of information about HIV and AIDS. *If you have HIV, it is important that you be tested for tuberculosis*, which is a very contagious and serious disease, because people with HIV have a much higher risk of getting tuberculosis.<sup>9</sup>

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<sup>3</sup> West Virginia Department of Health and Human Services, HIV/AIDS Information, *available at* [https://dhhr.wv.gov/oeps/std-hiv-hep/HIV\\_AIDS/Pages/HIVAIDSInformation.aspx](https://dhhr.wv.gov/oeps/std-hiv-hep/HIV_AIDS/Pages/HIVAIDSInformation.aspx) (last visited Feb. 9, 2018).

<sup>4</sup> See HIV Treatment Overview, *available at* <http://aids.gov/hiv-aids-basics/just-diagnosed-with-hiv-aids/treatment-options/overview-of-hiv-treatments/index.html> (last visited Oct. 1, 2017).

<sup>5</sup> See Centers for Disease Control & Prevention, HIV Transmission, *available at* <https://www.cdc.gov/hiv/basics/transmission.html> (last visited Oct. 1, 2017).

<sup>6</sup> See Centers for Disease Control & Prevention, HIV Transmission: Can I get HIV from a Tattoo or a Body Piercing?, *available at* <https://www.cdc.gov/hiv/basics/transmission.html> (last visited Oct. 1, 2017).

<sup>7</sup> See U.S. Dep’t. of Health & Human Services, HIV and Women’s Health, *available at* <https://www.hiv.gov/hiv-basics/staying-in-hiv-care/other-related-health-issues/womens-health-issues> (last visited Oct. 1, 2017).

<sup>8</sup> See U.S. Dep’t. of Health & Human Services, HIV and Women’s Health, *available at* <https://www.hiv.gov/hiv-basics/staying-in-hiv-care/other-related-health-issues/womens-health-issues> (last visited Oct. 1, 2017).

<sup>9</sup> See Division of Tuberculosis Elimination, Centers for Disease Control & Prevention, TB and HIV Coinfection, *available at* <https://www.cdc.gov/healthcommunication/toolstemplates/entertainment/tips/hivtb.html> (last visited Oct. 1, 2017).

## 2. Tuberculosis

Tuberculosis (“TB”) is a disease caused by bacteria (small, microscopic organisms) that are spread through the air. When you breathe in the bacteria, they usually settle in and attack your lungs,<sup>10</sup> but the bacteria can also move to and attack other parts of your body.<sup>11</sup> Outside of prison, TB does not spread easily. In prison, TB spreads much more easily because of overcrowding and poor air flow. People who have spent time in places where TB is common, like homeless shelters, drug treatment centers, health care clinics, jails, and prisons, are also more likely to have TB infections.<sup>12</sup>

It is important to know that being infected with the TB bacteria is *not* the same as having TB disease. If you have TB infection (“latent TB”), you will have no symptoms and you cannot spread TB to others. But if you do not get medical treatment, your TB infection can develop into TB disease (“active TB”).<sup>13</sup> If you have active TB, you can have symptoms like a bad cough lasting more than three weeks, pain in your chest, coughing up blood or phlegm, weakness or tiredness, weight loss, no appetite, chills, fever, or night sweating.<sup>14</sup>

TB is especially dangerous for people with HIV because they are less able to fight off diseases. In fact, TB is one of the leading causes of death for people with HIV.<sup>15</sup> People with both HIV and TB bacteria are much more likely to develop active TB than people who do not have HIV.<sup>16</sup>

Be sure to consult other sources and prison medical professionals if you think you have TB. Active TB disease can be treated and cured if you get medical care, take prescription medication, and follow doctor’s orders.<sup>17</sup>

## 3. Hepatitis B and Hepatitis C

Hepatitis is a disease that attacks the liver. There are different types of hepatitis, but the most common types among prisoners are hepatitis B and hepatitis C.

### a. Hepatitis B

The hepatitis B virus is spread in the same ways as HIV is spread. It can be spread by sex with infected persons without a condom, by sharing needles (“works”) when shooting drugs, through needle sticks or sharp exposures, or from an infected mother to her baby during birth.<sup>18</sup> You can avoid getting hepatitis B in the same ways you avoid getting HIV.

People who have hepatitis B often do not have any symptoms, but can still spread the virus to

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<sup>10</sup> See Division of Tuberculosis Elimination, Centers for Disease Control & Prevention, Basic TB Facts, *available at* <https://www.cdc.gov/tb/topic/basics/howtbspreads.htm> (last visited Oct. 1, 2017).

<sup>11</sup> See Division of Tuberculosis Elimination, Centers for Disease Control & Prevention, Basic TB Facts, *available at* <https://www.cdc.gov/tb/topic/basics/howtbspreads.htm> (last visited Oct. 1, 2017).

<sup>12</sup> See Centers for Disease Control & Prevention, TB in Specific Populations *available at* <https://www.cdc.gov/tb/topic/populations/default.htm> (last visited Oct. 1, 2017).

<sup>13</sup> Division of Tuberculosis Elimination, Centers for Disease Control & Prevention, Basic TB Facts, *available at* <http://www.cdc.gov/tb/topic/basics/default.htm> (last visited Oct. 1, 2017).

<sup>14</sup> See Division of Tuberculosis Elimination, Centers for Disease Control & Prevention, Signs & Symptoms, *available at* <https://www.cdc.gov/tb/topic/basics/signsandsymptoms.htm> (last visited Oct. 1, 2017).

<sup>15</sup> See Division of Tuberculosis Elimination, Centers for Disease Control & Prevention, TB and HIV Coinfection, *available at* <https://www.cdc.gov/tb/topic/basics/tbhivcoinfection.htm> (last visited Oct. 1, 2017).

<sup>16</sup> See Division of Tuberculosis Elimination, Centers for Disease Control & Prevention, TB and HIV Coinfection, *available at* <https://www.cdc.gov/tb/topic/basics/tbhivcoinfection.htm> (last visited Oct. 1, 2017).

<sup>17</sup> See Division of Tuberculosis Elimination, Centers for Disease Control & Prevention, Tuberculosis (TB): Treatment, *available at* <http://www.cdc.gov/tb/topic/treatment/default.htm> (last visited Oct. 1, 2017).

<sup>18</sup> See Centers for Disease Control & Prevention, Hepatitis B FAQs for the Public, *available at* <https://www.cdc.gov/hepatitis/hbv/bfaq.htm> (last visited Oct. 1, 2017).

other people.<sup>19</sup> If you do have symptoms, you may get yellow eyes and skin, tiredness, loss of appetite, dark pee, chest pains, and nausea. There are vaccines to protect you from hepatitis B, but once you get hepatitis B, there is no cure. You should still get medical attention, however, because there are medical treatments to help your symptoms.<sup>20</sup> If you have hepatitis B, you should get tested for HIV and hepatitis C.

#### b. Hepatitis C

The hepatitis C virus (“HCV”) causes hepatitis C. Almost 80% of people who have HCV do not show any signs or symptoms of hepatitis C. Many people infected with hepatitis C may not show any symptoms for twenty or thirty years. Hepatitis C symptoms include yellow skin, dark pee, fatigue, chest pain, and loss of appetite.<sup>21</sup> Most people (around 70%) with chronic HCV infection have some liver damage. If you have hepatitis C, you should not drink alcohol, because alcohol can make your liver damage worse.<sup>22</sup>

While few people outside of prison have HCV, a very high number of prisoners are infected with HCV.<sup>23</sup> To avoid getting hepatitis C, you should:

- 1) Never shoot drugs (if you cannot stop, never reuse or share syringes, water, or “works”);
- 2) Never share toothbrushes, razors, or other personal care items;
- 3) Avoid getting a tattoo or body piercing if there is a chance that someone else’s blood is on the tools or the artist or piercer does not follow good health practices;<sup>24</sup> and
- 4) Avoid having unprotected sex.

The risk of spreading hepatitis C through sexual intercourse is low. Hepatitis C is spread through contact with infected blood.<sup>25</sup> If you have hepatitis C, you should be tested for HIV and hepatitis B.

#### 4. Methicillin-resistant *Staphylococcus Aureus* (“MRSA”)

Staph is a kind of bacteria. Bacteria can cause infections. Staph can cause minor skin problems or even death.<sup>26</sup> Methicillin-resistant *Staphylococcus aureus*, or “MRSA,” is a kind of staph. MRSA is hard to treat with antibiotics.<sup>27</sup> Many people carry staph bacteria in their nose without getting sick.<sup>28</sup> People can get sick if the bacteria gets under their skin. This can happen through a scratch, scrape, or another injury. Most MRSA infections happen in places like hospitals. Infections in prisons are becoming more common though.<sup>29</sup>

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<sup>19</sup> See Centers for Disease Control & Prevention, Hepatitis B FAQs for the Public, *available at* <https://www.cdc.gov/hepatitis/hbv/bfaq.htm> (last visited Oct. 1, 2017).

<sup>20</sup> See Centers for Disease Control & Prevention, Hepatitis B FAQs for the Public, *available at* <https://www.cdc.gov/hepatitis/hbv/bfaq.htm> (last visited Oct. 1, 2017).

<sup>21</sup> See Centers for Disease Control & Prevention, Hepatitis C FAQs for the Public, *available at* <https://www.cdc.gov/hepatitis/hcv/cfaq.htm> (last visited Oct. 1, 2017).

<sup>22</sup> See Centers for Disease Control & Prevention, Hepatitis C FAQs for the Public, *available at* <https://www.cdc.gov/hepatitis/hcv/cfaq.htm> (last visited Oct. 1, 2017).

<sup>23</sup> See Centers for Disease Control & Prevention, Hepatitis C & Incarceration, *available at* <https://www.cdc.gov/hepatitis/hcv/pdfs/hepcincarcerationfactsheet-bw.pdf> (last visited Oct. 1, 2017).

<sup>24</sup> See Centers for Disease Control & Prevention, Hepatitis C & Incarceration, *available at* <https://www.cdc.gov/hepatitis/hcv/pdfs/hepcincarcerationfactsheet-bw.pdf> (last visited Oct. 1, 2017).

<sup>25</sup> Centers for Disease Control & Prevention, Hepatitis C General Information, <http://www.cdc.gov/hepatitis/HCV/PDFs/HepCGeneralFactSheet.pdf> (last visited Sept. 29, 2017).

<sup>26</sup> Centers for Disease Control & Prevention, Methicillin-Resistant *Staphylococcus Aureus* (MRSA) Infections, <http://www.cdc.gov/mrsa/index.html> (last visited Sept. 29, 2017).

<sup>27</sup> Centers for Disease Control & Prevention, Methicillin-Resistant *Staphylococcus Aureus* (MRSA) Infections, <http://www.cdc.gov/mrsa/index.html> (last visited Sept. 29, 2017).

<sup>28</sup> Centers for Disease Control & Prevention, General Information about MRSA in the Community, <http://www.cdc.gov/mrsa/community/index.html> (last visited Sept. 29, 2017).

<sup>29</sup> Divya Ahuja, MD, and Helmut Albrecht, MD, HIV and Community-Acquired MRSA, NEJM Journal Watch (2009), <http://aids-clinical-care.jwatch.org/cgi/content/full/2009/209/1> (last visited Sept. 29, 2017).

The first sign of MRSA is commonly a skin infection. The skin infection can be mistaken for a pimple, boil, or insect bite.<sup>30</sup> The infection may be painful or swollen. The infection may be red or produce pus.<sup>31</sup> The infection can become a large blister.<sup>32</sup> MRSA is usually treatable. MRSA is treated by draining the wound or taking antibiotics.<sup>33</sup> You should not drain the wound yourself because this can spread the infection.<sup>34</sup> The infection may return even after treatment.<sup>35</sup>

Staph infections can spread through direct physical contact. Staph infections can be spread through contact with an infected surface or object.<sup>36</sup> The risk of infection can be lessened by keeping wounds clean, dry, and covered.<sup>37</sup> You should keep shared surfaces clean. You should wash your hands often. You should wash your hands after touching a wound. You should avoid sharing personal items like razors and clothing.<sup>38</sup> If you think you have MRSA, it is important to seek treatment. It is very important to seek treatment if you have HIV or another issue with your immune-system. This is because a MRSA infection may lead to more serious problems.<sup>39</sup>

### C. CONSTITUTIONAL RIGHTS IN A PRISON SETTING

The rest of this Chapter talks about your rights regarding infectious diseases in prison. It explains when a correctional facility can limit your rights to treatment and protection. This Part explains the rule that courts use to figure out if a prison policy violates the Constitution. Knowing the rule will help you understand the court decisions in this Chapter.

In general, correctional facilities can limit your constitutional rights if the prison's actions are "reasonably related to [a] legitimate penal interest" ("penal" means related to the management of the prison).<sup>40</sup> To decide if a prison policy has a legitimate penal interest, courts look at four factors:

- 1) The existence of a valid, rational connection between the prison policy and a legitimate state

<sup>30</sup> Tara Parker-Pope, MRSA Warning Signs and Preventive Measures, N.Y. TIMES, Oct. 27, 2007, at B4, *available at* <http://www.nytimes.com/2007/10/27/nyregion/27mrsha.html?scp=3&sq=%22tara+parker-pope%22+MRSA&st=nyt> (last visited Sept. 29, 2017).

<sup>31</sup> Centers for Disease Control & Prevention, General Information About MRSA in the Community: What are MRSA Symptoms?, <http://www.cdc.gov/mrsa/community/index.html#how4> (last visited Sept. 29, 2017).

<sup>32</sup> Tara Parker-Pope, MRSA Warning Signs and Preventive Measures, N.Y. TIMES, Oct. 27, 2007, at B4, *available at* <http://www.nytimes.com/2007/10/27/nyregion/27mrsha.html?scp=3&sq=%22tara+parker-pope%22+MRSA&st=nyt> (last visited Sept. 29, 2017).

<sup>33</sup> Centers for Disease Control & Prevention, General Information About MRSA in the Community: Information for Clinicians, *available at* <https://www.cdc.gov/mrsa/community/clinicians/index.html> (last visited October 22, 2017).

<sup>34</sup> Tara Parker-Pope, MRSA Warning Signs and Preventive Measures, N.Y. TIMES, Oct. 27, 2007, at B4, *available at* <http://www.nytimes.com/2007/10/27/nyregion/27mrsha.html?scp=3&sq=%22tara+parker-pope%22+MRSA&st=nyt> (last visited Sept. 29, 2017).

<sup>35</sup> The University of Chicago Medicine: MRSA Research Center, Frequently Asked Questions about MRSA, *available at* [http://mrsa-research-center.bsd.uchicago.edu/patients\\_families/faq.html](http://mrsa-research-center.bsd.uchicago.edu/patients_families/faq.html) (last visited Oct. 22, 2017); Minnesota Department of Health, Learning About MRSA: A Guide for Patients, *available at* <http://www.health.state.mn.us/divs/idepc/diseases/mrsa/bookfs.pdf> (last visited Oct. 22, 2017).

<sup>36</sup> Tara Parker-Pope, MRSA Warning Signs and Preventive Measures, N.Y. TIMES, Oct. 27, 2007, at B4, *available at* <http://www.nytimes.com/2007/10/27/nyregion/27mrsha.html?scp=3&sq=%22tara+parker-pope%22+MRSA&st=nyt> (last visited Sept. 29, 2017).

<sup>37</sup> Tara Parker-Pope, MRSA Warning Signs and Preventive Measures, N.Y. TIMES, Oct. 27, 2007, at B4, *available at* <http://www.nytimes.com/2007/10/27/nyregion/27mrsha.html?scp=3&sq=%22tara+parker-pope%22+MRSA&st=nyt> (last visited Sept. 29, 2017).

<sup>38</sup> Centers for Disease Control & Prevention, General Information About MRSA in the Community: Can I Prevent MRSA? How?, <http://www.cdc.gov/mrsa/community/index.html#how3> (last visited Sept. 29, 2017); National Institutes for Occupational Safety and Health, MRSA and the Workplace, <http://www.cdc.gov/niosh/topics/mrsa/> (last visited Sept. 29, 2017); National Institutes for Occupational Safety and Health, MRSA Can Live on High-Touch Surfaces (Correctional Facilities), *available at* <http://www.cdc.gov/niosh/docs/2013-124/> (last visited Sept. 29, 2017).

<sup>39</sup> Divya Ahuja, MD, and Helmut Albrecht, MD, HIV and Community-Acquired MRSA, NEJM Journal Watch (2009), *available at* <http://aids-clinical-care.jwatch.org/cgi/content/full/2009/209/1> (last visited Sept. 29, 2017).

<sup>40</sup> Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 77–78 (1987) (holding that prison systems' regulations of inmate marriages and inmate-to-inmate correspondence must meet a "reasonable relationship" standard.)

- interest;
- 2) The existence of alternative means of exercising the right being limited;
  - 3) The impact granting the right will have on correction officers, other prisoners, or the allocation of prison resources; and
  - 4) Whether the prison policy or regulation is an exaggerated response to prison concerns.<sup>41</sup>

These four factors are often referred to as the *Turner* standard, since the Supreme Court first stated this standard in *Turner v. Safley*.<sup>42</sup>

So, if you think a prison policy illegally violates your constitutional rights, there are several arguments you can make. You may want to argue that there is no legitimate penal interest which justifies the violation. You could also argue that the penal interest is not “reasonably related” to the actions or policy of the prison officials. Courts have already ruled on many issues related to infectious diseases and constitutional rights. For example, courts have said that involuntary TB testing serves a legitimate state interest in preventing the spread of TB.<sup>43</sup> You can also try to argue that there are other ways of accomplishing the same governmental goal without violating your constitutional rights.

## D. LEGAL RIGHTS CONCERNING TESTING FOR INFECTIOUS DISEASES

### 1. Involuntary Testing

This Section explains when you can be tested for infectious diseases in Louisiana without your consent. Being tested without your consent or, in other words, being involuntarily tested, means being tested for an infectious disease even though you may not want to be tested and do not give permission to be tested. The specific reasons you may be involuntarily tested for an infectious disease vary by the disease being tested for, the type of facility you are in, and the type of offense with which you have been indicted or charged. As this Chapter and Chapter 26 of the main *JLM* explain, courts tend to allow involuntary testing for infectious diseases because prevention of disease is deemed a legitimate state interest.

Generally, in Louisiana, you can be tested for an infectious disease without your consent if you bite another person, throw feces at another person, or come in contact with a person that may spread an infectious disease, such as HIV/AIDS or viral hepatitis.<sup>44</sup> You may also be tested without your consent if you are involved in a dispute (or a fight) in which bodily fluids, like blood, might have been exchanged between you and another person.<sup>45</sup> In either situation, you may be tested without your consent even if you did not start the dispute.<sup>46</sup>

#### a. HIV/AIDS Testing

You may be tested for HIV or AIDS without your consent in a variety of situations. First, you may be involuntarily tested if you are indicted or charged for a sexual offense or you are arrested for battery of a police officer or correctional officer.<sup>47</sup> Second, you may be tested because you are involved in an altercation while confined in a prison or jail in which bodily fluids are exchanged.<sup>48</sup> Louisiana does not require that you be tested for HIV/AIDS before beginning your sentence.<sup>49</sup>

<sup>41</sup> *Turner v. Safley*, 482 U.S. 78, 89–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987).

<sup>42</sup> *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

<sup>43</sup> See *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997); *Herbet v. Neustrom*, 2009 WL 2356450, at \*3 (W.D. La. July 29, 2009).

<sup>44</sup> LA. REV. STAT. ANN. § 15:739 (2017).

<sup>45</sup> LA. REV. STAT. ANN. § 15:831(c) (2017).

<sup>46</sup> LA. REV. STAT. ANN. § 15:739 (2017).

<sup>47</sup> LA. REV. STAT. ANN. § 15:535(C) (2017); LA. CODE CRIM. PROC. ANN. art. 499 (2017); LA. CODE CRIM. PROC. ANN. art. 221 (2017).

<sup>48</sup> LA. REV. STAT. ANN. § 15:739 (2017).

<sup>49</sup> James Lee Pope, HIV Testing in State Correctional Systems, 22 J.L. & HEALTH 17, 32 (2009).

i. *Testing following Indictment or Charging with Certain Sexual Offenses*

You can be tested for HIV/AIDS without your consent if you are indicted or charged with certain sex crimes.

If charges for a sexual offense are filed against you, the court will order that you be tested for HIV/AIDS.<sup>50</sup> Sexual offenses include rape, sexual battery, intentional exposure to the AIDS virus, molestation of a juvenile, and various other offenses.<sup>51</sup> The results of that test will be disclosed to the court.<sup>52</sup> The court order that requires you to take the test will include the location where the test can be given to you.<sup>53</sup> The court can choose to notify any victims and the law requires that a court must notify certain healthcare authorities.<sup>54</sup>

If you are indicted for certain sex crimes like rape, aggravated rape, or sexual battery, then the victim may request that you be tested for HIV/AIDS.<sup>55</sup> The request must come within 48 hours of your indictment. If the victim makes this request, the court will order you to be tested for HIV/AIDS.<sup>56</sup> After 48 hours from the time you are indicted, a victim may still request that you be tested for HIV/AIDS.<sup>57</sup> However, the court will decide whether the test is medically appropriate.<sup>58</sup> If the test is medically appropriate, then the court will order you to be tested for HIV/AIDS.<sup>59</sup> The results of a test will be disclosed to the victim, but not to the court.<sup>60</sup>

If you are convicted of rape, aggravated rape, or sexual battery, then you will be tested for HIV/AIDS.<sup>61</sup> The results of the test will be reported to any victim and the Department of Public Safety and Corrections.<sup>62</sup>

ii. *Testing Following Altercation with Police or Corrections Officer*

You can be involuntarily tested if you are arrested for committing battery of a police or corrections officer and that officer then tests positive for HIV/AIDS or other infectious diseases.<sup>63</sup> Battery of a police or corrections officer includes throwing feces, urine, blood, or other bodily fluids at the officer while confined in a jail, prison, or other corrections facility.<sup>64</sup> You can also be tested involuntarily if you are arrested for intentionally exposing an officer to AIDS and the officer tests positive for HIV/AIDS.<sup>65</sup> If you are tested involuntarily for this reason, you will be responsible for paying for the test.<sup>66</sup>

If you do anything during an arrest that might expose an officer to a disease like HIV/AIDS, then you can be involuntarily tested.<sup>67</sup> The officer must request this test from the criminal district court.<sup>68</sup> The

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<sup>50</sup> LA. CODE CRIM. PROC. ANN. art. 499(A) (2017).

<sup>51</sup> LA. REV. STAT. ANN. § 15:541(24) (2017); *see also* LA. ADMIN CODE. tit. 48 § 13503(E)(7) (2017).

<sup>52</sup> LA. CODE CRIM. PROC. ANN. art. 499(B) (2017).

<sup>53</sup> LA. CODE CRIM. PROC. ANN. art. 499(B) (2017).

<sup>54</sup> LA. CODE CRIM. PROC. ANN. art. 499(B) (2017).

<sup>55</sup> LA. REV. STAT. ANN. § 15:535(C)(2) (2017); LA. REV. STAT. ANN. §§ 14:42–14:43 (2017).

<sup>56</sup> LA. REV. STAT. ANN. § 15:535(C)(2) (2017).

<sup>57</sup> LA. REV. STAT. ANN. § 15:535(C)(2)(a) (2017).

<sup>58</sup> LA. REV. STAT. ANN. § 15:535(C)(2)(b) (2017).

<sup>59</sup> LA. REV. STAT. ANN. § 15:535(C)(2)(b) (2017).

<sup>60</sup> LA. REV. STAT. ANN. § 15:535(C)(2)(c) (2017).

<sup>61</sup> LA. REV. STAT. ANN. § 15:535(C)(1) (2017); LA. REV. STAT. ANN. §§ 14:42–14:43 (2017).

<sup>62</sup> LA. REV. STAT. ANN. § 15:535(C)(1) (2017).

<sup>63</sup> LA. CODE CRIM. PROC. ANN. arts. 221(A), (C) (2017).

<sup>64</sup> LA. REV. STAT. ANN. § 14:34.2(A)(3) (2017).

<sup>65</sup> LA. CODE CRIM. PROC. ANN. arts. 221(A), (C) (2017).

<sup>66</sup> LA. CODE CRIM. PROC. ANN. art. 221(C)(4) (2017).

<sup>67</sup> LA. CODE CRIM. PROC. ANN. art. 222(A) (2017).

<sup>68</sup> LA. CODE CRIM. PROC. ANN. art. 222(B) (2017).

results of your test will be shared with you and with the requesting officer.<sup>69</sup> However, the test will not be used against you in any proceeding related to the arrest.<sup>70</sup> You will have to pay for the cost of this test.<sup>71</sup>

#### b. TB Testing

You will be tested for TB if you are going to be in a Louisiana prison for longer than 48 hours.<sup>72</sup> You will also be tested if you are going to be confined in a parish jail for longer than 14 days.<sup>73</sup> From then on, you may be involuntarily tested for TB each year.<sup>74</sup>

Normally, prisons will give you a skin test for TB, but if you are HIV-positive or have AIDS, then they will give you both a skin test and a chest x-ray.<sup>75</sup> If you are HIV-positive or have AIDS, you may be tested for TB while you are being treated for HIV or AIDS.<sup>76</sup>

#### c. Hepatitis Testing

Like HIV/AIDS and other infectious diseases, if you bite someone or throw blood, urine, feces, or other bodily fluids at them, you may be involuntarily tested for hepatitis.<sup>77</sup> You will have to pay for the costs of this test.<sup>78</sup> You may also be tested for hepatitis if you are arrested or charged with battery of a police or corrections officer. You might also be tested if you are charged with intentionally exposing an officer to AIDS and that officer tests positive for hepatitis.<sup>79</sup>

If you do anything during an arrest that might expose an officer to an infectious disease like hepatitis, then you can be involuntarily tested.<sup>80</sup> The officer must request this test from the criminal district court.<sup>81</sup> The results of your test will be shared with you and with the requesting officer.<sup>82</sup> However, the test will not be used against you in any proceeding related to the arrest.<sup>83</sup> You will have to pay for the cost of this test.<sup>84</sup>

If you test positive for hepatitis, you should ask for special medical treatment.<sup>85</sup> If you don't ask for special medical care for your hepatitis, you might not get it.<sup>86</sup>

## 2. Right to Testing Upon Request

In Louisiana, you may sometimes request to be tested for HIV/AIDS, hepatitis, or other sexually transmitted diseases. You can ask for testing if you have bodily fluids thrown at or around you.<sup>87</sup> You can also ask for testing if another person exposes you to an infectious disease.<sup>88</sup> To be tested, you need to tell

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<sup>69</sup> LA. CODE CRIM. PROC. ANN. art. 222(C) (2017).

<sup>70</sup> LA. CODE CRIM. PROC. ANN. art. 222(D) (2017).

<sup>71</sup> LA. CODE CRIM. PROC. ANN. art. 222(F) (2017).

<sup>72</sup> LA. ADMIN. CODE tit. 51 § 301(A) (2017); LA. REV. STAT. ANN. § 40:4(A)(2)(c)(iv) (2017).

<sup>73</sup> LA. ADMIN. CODE tit. 51 § 301(B) (2017); LA. REV. STAT. ANN. § 40:4(A)(2)(c)(v) (2017).

<sup>74</sup> Dep't. of Pub. Safety and Corr., Master Plan: Where We Are-Where We're Going: A Report to the State, 25 (Aug. 2003), *available at* [http://doc.louisiana.gov/media/1/dps\\_20master\\_20plan\\_208-2003.pdf](http://doc.louisiana.gov/media/1/dps_20master_20plan_208-2003.pdf) (last visited Jan. 25, 2018).

<sup>75</sup> LA. ADMIN. CODE tit. 51 § 301(A) (2017).

<sup>76</sup> LA. REV. STAT. ANN. § 40:4(A)(2)(c)(vi) (2017).

<sup>77</sup> LA. REV. STAT. ANN. § 15:739(A)(1) (2017).

<sup>78</sup> LA. REV. STAT. ANN. § 15:739(B)(3) (2017).

<sup>79</sup> LA. CODE CRIM. PROC. ANN. art. 221(A), (C) (2017).

<sup>80</sup> LA. CODE CRIM. PROC. ANN. art. 222(A) (2017).

<sup>81</sup> LA. CODE CRIM. PROC. ANN. art. 222(B) (2017).

<sup>82</sup> LA. CODE CRIM. PROC. ANN. art. 222(C) (2017).

<sup>83</sup> LA. CODE CRIM. PROC. ANN. art. 222(D) (2017).

<sup>84</sup> LA. CODE CRIM. PROC. ANN. art. 222(F) (2017).

<sup>85</sup> LA. CODE CRIM. PROC. ANN. art. 221(C)(3) (2017).

<sup>86</sup> LA. CODE CRIM. PROC. ANN. art. 221(C)(3) (2017).

<sup>87</sup> LA. REV. STAT. ANN. § 15:739(C) (2017).

<sup>88</sup> LA. REV. STAT. ANN. § 15:739(A), (C) (2017).

the chief administrator of the facility about the incident and ask to be tested.<sup>89</sup> The chief administrator might also order other prisoners to be tested if they were involved in the incident.<sup>90</sup>

If they refuse to test you, it might be a violation of the correctional facility's policy. It might also be a violation of your constitutional rights. At least one federal court has said that there is no constitutional right to HIV testing, especially when the prisoner doesn't have a good reason to think that they might have HIV.<sup>91</sup> Still, you may have an Eighth Amendment claim if you meet the requirements in this section or if you have a high risk of HIV because of drug use, sex, or medical symptoms and are still denied an HIV test.<sup>92</sup> You should check Chapter 26 of the main *JLM* and Part C of this chapter for more information on Eighth Amendment claims.

### 3. Consequences of Testing Positive for Infectious Diseases in Louisiana

If you test positive for an infectious disease, certain things can happen to you. If you test positive for HIV/AIDS, tuberculosis, hepatitis, MRSA, or another infectious disease then it will be reported to the Louisiana Office of Public Health.<sup>93</sup> If you were tested because of a sex offense, as explained in Part D(1)(a)(i) of this chapter, then any victim may be told about your test results.<sup>94</sup>

If you test positive, you can ask for counseling and a referral to receive medical care. A referral means you will be given the name of a special doctor to treat you. If you test positive because you were part of an incident where bodily fluids were thrown or you came into contact with someone in a way that might have exposed you to an infectious disease, then the facility must give you counseling and referral to medical and support services.<sup>95</sup> Jails and prisons must give you access to reasonable medical care. Also, there may be support groups or other programs at your facility for people with certain infectious diseases. For example, some facilities may offer special programs and support groups for prisoners who have tested positive for HIV/AIDS, like peer-counseling programs.<sup>96</sup>

## E. LEGAL RIGHTS AND PREVENTION OF INFECTIOUS DISEASES

### 1. Prevention and Prison Policy

The government must provide medical care to people in jail or prison.<sup>97</sup> They might also have to protect prisoners from infectious diseases.<sup>98</sup> But, it is also very important to take the needed steps to protect yourself and others from disease.

<sup>89</sup> LA. REV. STAT. ANN. § 15:739(C) (2017).

<sup>90</sup> LA. REV. STAT. ANN. § 15:739(C) (2017).

<sup>91</sup> See *St. Hilaire v. Lewis*, No. 93-15129, 1994 U.S. App. LEXIS 14867, at \*10 (9th Cir. June 7, 1994) (unpublished) (finding no constitutional violation for failure to provide an HIV test because prisoner was not a member of a high-risk group and had not alleged exposure to HIV); *Doe v. Wigginton*, 21 F.3d 733, 738–739 (6th Cir. 1994) (finding no 8th Amendment violation where a prisoner was refused an HIV test because the state policy required an HIV test if a prisoner “provides a presumptive history of exposure” and the prisoner did not provide such information).

<sup>92</sup> See *Doe v. Wigginton*, 21 F.3d 733, 738–740 (6th Cir. 1994) (holding the prison did not violate the 8th or 14th Amendments for refusing to test for HIV on request because it could reasonably limit the testing based on a prisoner's history, medical symptoms, prior drug use, or sexual activity). It is possible the court would have allowed Doe's claim to prevail if he had given officials information indicating that he met the criteria for testing and was still refused a test.

<sup>93</sup> LA. ADMIN. CODE tit. 51 §§ 105, 109 (2017).

<sup>94</sup> LA. REV. STAT. ANN. § 15:535(C)(2)(c) (2017).

<sup>95</sup> LA. REV. STAT. ANN. § 15:739(B)(1) (2017).

<sup>96</sup> For example, the Elayn Hunt Correctional Center has an HIV support group where prisoners can “express their feelings about the experiences they have being HIV positive and show support for one another.” The Louisiana Correctional Institute for Women hosts a support group sponsored by outside volunteers for women prisoners with HIV/AIDS. The David Wade Correctional Center is home to H.E.L.P.E.R., a prisoner-run organization that educates fellow prisoners about HIV/AIDS. Louisiana Department of Public Safety and Corrections, Catalog of Rehabilitative Programs (July 2012), available at <https://lajudicialcollege.org/wp-content/uploads/2012/10/C-6-Catalog-of-DOC-Rehabilitative-Services.pdf> (last visited Oct. 22, 2017).

<sup>97</sup> See *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251, 259 (1976) (confirming “the government's obligation to provide medical care for those whom it is punishing by incarceration”). See Chapter 23 of



## 2. Segregation

### a. Mandatory Segregation

If you test positive for HIV/AIDS, hepatitis, tuberculosis, or other contagious diseases (this means diseases that can easily spread between people), you may be segregated (which means separated) from the general population.<sup>99</sup> While you can be segregated because you tested positive for HIV/AIDS or hepatitis, many facilities will let you stay in the general population.<sup>100</sup> If you test positive for tuberculosis, you will likely be separated from the general population while you get further testing and treatment. This is because tuberculosis can spread quickly through the air.

It may be hard to challenge your segregation if you disagree with it. You may be able to challenge it through administrative procedures, which are ways to bring a complaint created by the prison. You may also bring a constitutional claim to fight your segregation. However, you are unlikely to win this way. In the past, courts have said that there is a legitimate state interest in segregating prisoners with HIV/AIDS and tuberculosis, which means it is okay for the prison to separate people who test positive.<sup>101</sup> This is because segregation may help protect other prisoners from getting infectious diseases.<sup>102</sup> For more information on challenging your classification, see Chapter 12 of the *Louisiana State Supplement* and Chapter 31 of the main *JLM*.

### b. Segregation Requested by Prisoners

If you are afraid of getting an infectious disease, read Part B of this Chapter to get an idea of the steps that you can take to protect yourself. In general, prisoners who are afraid of getting infectious diseases from other prisoners have not been able to win when they sue prison officials. Some prisoners have tried to get prisons to segregate other prisoners who are infected with a contagious disease, but this usually does not work. Prisoners who are infected have also been unsuccessful when they request that the prison give them a single cell (or vaccinate other prisoners) so that they do not spread their diseases.<sup>103</sup> Courts seem to support a prison's decision not to separate prisoners with HIV-related illnesses.<sup>104</sup>

Prisons may have a legal duty to protect prisoners from exposure to infectious diseases.<sup>105</sup> But, to win a lawsuit against prison officials for exposing you to infectious diseases, you must prove that (1) there

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the main *JLM* for more information on a prison's duty to provide medical care and what you can do if you are not receiving proper care.

<sup>98</sup> See *Smith v. Sullivan*, 553 F.2d 373, 380 (5th Cir. 1977) (holding that though a prison is not required to conduct medical exams on prisoners within 36 hours of entering the facility, leaving persons with communicable or contagious diseases, like scabies or gonorrhea, among other prisoners for a month or more, without medical care, violated the standard of adequate medical services); *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981) (finding that a prison's failure to adequately screen incoming prisoners "created an indiscriminate threat to all inmates" in violation of the Fourteenth Amendment, and constituted a failure "sufficiently harmful to evidence deliberate indifference to serious medical needs" in violation of the Eighth Amendment).

<sup>99</sup> LA. ADMIN. CODE tit. 51 § 103(D) (2017); LA. ADMIN. CODE tit. 22 § 3303 (2017).

<sup>100</sup> Lafayette Parish Sheriff's Office, H-2603(C), Bloodborne Diseases—Health Care (2010) available at [http://www.lafayettesheriff.com/uploads/H\\_2600\\_BloodborneDiseasesHealthCare.pdf](http://www.lafayettesheriff.com/uploads/H_2600_BloodborneDiseasesHealthCare.pdf) (last visited Sept. 30, 2017); LA. ADMIN. CODE tit. 51 § 103(D) (2017).

<sup>101</sup> See *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997); *Moore v. Mabus*, 976 F.2d 268, 271 (5th Cir. 1992).

<sup>102</sup> See *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997).

<sup>103</sup> *Johnson v. Horn*, 782 A. 2d 1073, 1076–1077 (Pa. Commw. Ct. 2001) (refusing to give court order forcing prison officials to assign prisoner to a single cell so he would not spread hepatitis C to other prisoners).

<sup>104</sup> See *Deutsch v. Fed. Bureau of Prisons*, 737 F. Supp. 261, 267–268 (S.D.N.Y. 1990), *aff'd*, 930 F.2d 909 (2d Cir. 1991) (holding that prisoner did not have the right to have another HIV-positive prisoner segregated unless the inmate poses a known health risk); *Glick v. Henderson*, 855 F.2d 536, 539–540 (8th Cir. 1988) (holding that prisoner's fear of contracting HIV either through sharing work assignments with an HIV-infected prisoner or through eating food that might have been prepared by an HIV-infected prisoner, was not sufficient to justify an order to segregate HIV-infected prisoners).

<sup>105</sup> See *Smith v. Sullivan*, 553 F.2d 373, 380 (5th Cir. 1977) (stating that leaving persons with communicable or contagious diseases, such as scabies or gonorrhea, without medical attention for over a month, and in the midst of other prisoners violated the required standard of adequate medical services); *Hutto v. Finney*, 437 U.S. 678, 682–687,

was a specific and significant (or high) risk of infection, and (2) prison officials knew about that risk but ignored it.<sup>106</sup> In order to win such a lawsuit, you must show that there is a significant possibility that you will contract the virus or disease. For example, some courts have held that this standard is met when prisoners are housed with people who have known MRSA infections. In order to meet the standard, however, the infected prisoner must have open wounds that are not being adequately covered or cleaned and that are likely to infect other prisoners.<sup>107</sup> You will not win if you only have a general fear of getting the virus.

## F. LEGAL RIGHTS AND CONFIDENTIALITY

Your medical records are usually confidential.<sup>108</sup> Under the U.S. Constitution, you have a right to privacy (a “privacy interest”) regarding the disclosure of personal information.<sup>109</sup> However, doctors, nurses, certain state health officers, certain prison officials, and others are authorized by Louisiana law to view your medical records in certain situations. Also, if you test positive for HIV/AIDS, hepatitis, tuberculosis, MRSA, or a variety of other infectious diseases, then that result will be reported to the Office of Public Health.<sup>110</sup> For information about your general medical privacy, see Chapter 23 of the main *JLM*, “Your Right to Adequate Medical Care” and Chapter 14 of the *Louisiana State Supplement*.

### 1. HIV/AIDS Testing and Confidentiality

As noted above, if you test positive for HIV/AIDS, then this result will be reported to the Office of Public Health. There are other situations in which your positive test result will be disclosed. For example, your HIV or AIDS status may be disclosed to:

- 1) Doctors and nurses who are treating you,<sup>111</sup>
- 2) Members of the parole committee of the DPSC,<sup>112</sup>
- 3) People to whom a court order authorizes the release of your test results,<sup>113</sup> and

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98 S. Ct 2565, 2569–2572 (1978) (finding that prison conditions unconstitutional under the 8th Amendment where (among other concerns) inmates in “punitive isolation” were crowded into cells, and some had infectious conditions such as hepatitis and venereal diseases); *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981) (finding that prison’s failure to adequately screen incoming prisoners violated the due process and 8th Amendment rights of other prisoners).

<sup>106</sup> See *Massick v. N. Cent. Corr. Facility*, 136 F.3d 580, 581 (8th Cir. 1998) (holding that there was no 8th Amendment violation when prison officials placed the plaintiff in a cell with an HIV-positive prisoner, who had open bleeding wounds, without warning the plaintiff of his cellmate’s HIV status; the court found no constitutional violation, because the risk of plaintiff contracting HIV was small and because prison officials acted reasonably by granting plaintiff’s request to change cellmates); *Billman v. Ind. Dep’t. of Corrs.*, 56 F.3d 785, 788–789 (7th Cir. 1995) (holding that prison officials who knowingly and without warning assign a prisoner to share a cell with an HIV-positive prisoner who has a known propensity to rape, constitutes an 8th Amendment violation due to the official’s “deliberate indifference” to the “fear and humiliation inflicted by the rape and the fear of contracting the AIDS virus”); *DeGidio v. Pung*, 920 F.2d 525, 533 (8th Cir. 1990) (holding that prison officials’ pattern of reckless or negligent responses to TB outbreaks was sufficient to constitute deliberate indifference, violating the 8th Amendment).

<sup>107</sup> See *Lopez v. McGrath*, No. C 04-4782 MHP, 2007 U.S. Dist. LEXIS 39409, at \*3–6, \*31 (N.D. Cal. May 31, 2007) (finding a triable issue of fact where plaintiff claimed that administrators knew medical staff were putting prisoners with MRSA infections back into the general population, possibly creating “substantial risk” to other prisoners); *Kimble v. Tennis*, No. 4:CV-05-1871, 2006 U.S. Dist. LEXIS 36285, at \*11 (M.D. Pa. June 5, 2006) (holding that evidence that prison doctor authorized release of a MRSA-infected prisoner with open sores to the general population may be sufficient to support a claim of deliberate indifference).

<sup>108</sup> LA. ADMIN. CODE tit. 48 § 505 (2017).

<sup>109</sup> See *Whalen v. Roe*, 429 U.S. 589, 598–600, 97 S. Ct. 869, 876, 51 L. Ed. 2d 64, 73 (1977) (finding that the U.S. Constitution protects your right to make personal decisions and against disclosure of your personal information) (non-prison case); *O’Connor v. Pierson*, 426 F.3d 187, 201 (2d Cir. 2005) (“Medical information in general, and information about a person’s psychiatric health and substance-abuse history in particular, is information of the most intimate kind.”) (non-prison case).

<sup>110</sup> LA. ADMIN. CODE tit. 51 §§ 105, 109 (2017).

<sup>111</sup> LA. REV. STAT. ANN. § 40:1171.4(B)(3) (2017).

<sup>112</sup> LA. REV. STAT. ANN. § 40:1171.4(B)(9) (2017).

<sup>113</sup> LA. REV. STAT. ANN. § 40:1171.4(C)(4) (2017).

- 4) Federal, state, and local health officers as authorized by law.<sup>114</sup>

If you are tested because were charged or convicted of a sexual offense, then the results of your test will be disclosed to any victim.<sup>115</sup> If you test positive, then your result will also be reported to the Department of Public Safety and Corrections.<sup>116</sup> Also, if you are tested because of being charged with battery upon a police officer or intentionally exposing an officer to AIDS *and* you test positive, then this result will be given to the chief administrator of the prison or jail.<sup>117</sup>

A court may order the disclosure of your HIV test result.<sup>118</sup> Some of the reasons a court may order the disclosure besides those stated above include:

- 1) There is a compelling need for disclosure because of a civil or criminal proceeding;<sup>119</sup>
- 2) There is a clear and imminent (imminent means “about to happen”) danger to a person who may unknowingly be at risk for exposure because of contact with you;<sup>120</sup> or
- 3) A parish, state, or local health officer applies for the disclosure because of a clear and imminent danger to public health.<sup>121</sup>

If the court receives an application requesting the disclosure of your test results, you should be notified.<sup>122</sup> Also, the court will seal court documents to protect the confidentiality of your results.<sup>123</sup>

If you test positive for HIV/AIDS, then that can only be disclosed to individuals authorized by law.<sup>124</sup> This means that a person authorized to know your positive test results cannot tell another person who is not authorized.

## G. LEGAL RIGHTS AND MEDICAL TREATMENT

### 1. Right to Medical Treatment

Prisons and jails in Louisiana must provide you with healthcare.<sup>125</sup> This includes an initial screening, a yearly medical examination, and access to emergency healthcare.<sup>126</sup> Under Louisiana law, this medical care must be “reasonable.”<sup>127</sup> What medical care is reasonable will vary from situation to situation.<sup>128</sup> Louisiana courts have not provided a complete list of factors that may determine whether

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<sup>114</sup> LA. REV. STAT. ANN. § 40:1171.4(B)(6) (2017).

<sup>115</sup> LA. CODE CRIM. PROC. ANN. art. 499(B) (2017); LA. REV. STAT. ANN. § 15:535(C) (2017). *See also* LA. REV. STAT. ANN. § 40:1171.4(E)(1)(a) (2017).

<sup>116</sup> LA. REV. STAT. ANN. § 15:535(C) (2017).

<sup>117</sup> LA. CODE CRIM. PROC. ANN. art. 221 (C)(2) (2017).

<sup>118</sup> LA. REV. STAT. ANN. § 40:1171.5(B) (2017).

<sup>119</sup> LA. REV. STAT. ANN. § 40:1171.5(B)(1) (2017).

<sup>120</sup> LA. REV. STAT. ANN. § 40:1171.5(B)(2) (2017).

<sup>121</sup> LA. REV. STAT. ANN. § 40:1171.5(B)(3) (2017).

<sup>122</sup> LA. REV. STAT. ANN. § 40:1171.5(D)(1) (2017).

<sup>123</sup> LA. REV. STAT. ANN. § 40:1171.5(C) (2017).

<sup>124</sup> LA. ADMIN. CODE tit. 48 § 13505 (2017).

<sup>125</sup> LA. ADMIN. CODE tit. 22 § 2909 (2017); *see also* LA. REV. STAT. ANN. §§ 15:760, 15:831 (2017).

<sup>126</sup> LA. ADMIN. CODE tit. 22 §§ 2909(E), (I), (J) (2017).

<sup>127</sup> *See e.g.*, *Jacoby v. State*, 434 So. 2d 570, 573 (La. App. 1 Cir. 1983); *see also* *Cole v. Arcadia Parish Sheriff's Dep't.*, 2007-1386, pp. 5–6 (La. App. 3 Cir. 11/05/08); 998 So. 2d 212, 216; *Wells v. Dep't. of Public Safety and Corr.*, 41,836, p. 4 n.5 (La. App. 2 Cir. 3/7/07); 954 So. 2d 234, 237 n.5; *Elsev v. Sheriff of the Parish of East Baton Rouge*, 435 So. 2d 1104, 1106 (La. App. 1 Cir. 1983).

<sup>128</sup> *See e.g.*, *Neidlinger v. Warden, Medical Dep't.*, 45,235, pp. 6–7 (La. App. 2 Cir. 5/19/10); 38 So. 3d 1171, 1174 (holding that prisoner received reasonable medical care when he was treated for a spider bite and subsequently sent to a hospital after the bite became worse); *Harper v. Goodwin*, 41,035, p. 7 (La. App. 2 Cir. 5/17/06); 930 So. 2d 1160, 1163 (holding that prisoner received reasonable medical care because he received prompt treatment after bee stings); *Robinson v. Stalder*, 98-0558 (La. App. 1 Cir. 1999); 734 So. 2d 810, 812–813 (holding that reasonable medical care was provided when corrections officials refused to repair a prosthetic leg that was no longer repairable, but did provide a wheelchair and crutches); *Dancer v. Dep't. of Corr.*, 282 So. 2d 730, 731–733 (La. App. 1 Cir. 1973) (noting that having

medical care is reasonable. However, a court may look at factors that include the nature of the medical need, the urgency of treatment, possible alternatives in treatment, and what symptoms of an illness are visible.<sup>129</sup>

If you are denied medical treatment for an infectious disease, you may also have a claim that the prison violated your rights under the Eighth Amendment. The Eighth Amendment protects you from cruel and unusual punishment. To win an Eighth Amendment claim, you must prove that prison officials showed “deliberate indifference” to your “serious medical needs.”<sup>130</sup> It is important to remember that courts do not think that every claim of inadequate medical care is bad enough to be a constitutional violation.<sup>131</sup> But a few courts have held that a denial of prescribed AIDS or hepatitis C medical treatment does violate a prisoner’s constitutional rights.<sup>132</sup> See Chapter 23 of the main *JLM*, “Your Right to Adequate Medical Care,” for more information on how to bring an Eighth Amendment claim for failure to provide adequate medical treatment.

If you believe that your health is suffering because you are being wrongfully denied medicine, you will probably have to show that the medical community agrees that this medicine will help your condition. Otherwise, the court may see your claim as a simple disagreement between you and your doctor.<sup>133</sup> If you want to bring a claim about medical treatment or medicine denied to you sometime in the past, a court may look back to see what the accepted medical practices were at that time.<sup>134</sup> Even if past treatment or

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another prisoner, who did not have formal medical training, set the broken leg of another prisoner was not reasonable medical care).

<sup>129</sup> See e.g., *Neidlinger v. Warden, Medical Dep’t.*, 45,235, pp. 6–7 (La. App. 2 Cir. 5/19/10); 38 So. 3d 1171, 1174 (holding that prisoner received reasonable medical care when he was treated for a spider bite and subsequently sent to a hospital after the bite became worse); *Harper v. Goodwin*, 41,035, p. 7 (La. App. 2 Cir. 5/17/06); 930 So. 2d 1160, 1163 (holding that prisoner received reasonable medical care because he received prompt treatment after bee stings); *Robinson v. Stalder*, 98-0558 (La. App. 1 Cir. 1999); 734 So. 2d 810, 812–813 (holding that reasonable medical care was provided when corrections officials refused to repair a prosthetic leg that was no longer repairable, but did provide a wheelchair and crutches); *Dancer v. Dep’t. of Corr.*, 282 So. 2d 730, 733 (La. App. 1 Cir. 1973) (noting that having another prisoner without formal medical training set the broken leg of another prisoner was not reasonable medical care).

<sup>130</sup> *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998) (describing the standard for bringing an 8th Amendment claim for failure to receive proper medical care) (citing *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291 (1976)). HIV and hepatitis are generally considered “serious medical needs.” *Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004).

<sup>131</sup> *Smith v. Carpenter*, 316 F.3d 178, 184, 186–187 (2d Cir. 2003) (citing *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976)) (holding that brief interruptions of HIV medications, with no discernible adverse effects, did not constitute a denial of serious medical needs. However, the court also noted that a showing of increased risk, even absent presently detectable symptoms, might be serious enough to constitute denial of medical care).

<sup>132</sup> *Montgomery v. Pinchak*, 294 F.3d 492, 500 (3d Cir. 2002) (finding HIV-positive prisoner’s claim regarding violation of his right to adequate medical treatment had merit and holding that because HIV is a life-threatening disease if left untreated, the prisoner had met the serious medical need prong of *Estelle v. Gamble*). But see *Johnson v. Wright*, 412 F.3d 398, 404–406 (2d Cir. 2005) (finding that although a facility’s refusal to give a prisoner the medication most prisoners received for hepatitis C because he had used illegal drugs constituted deliberate indifference, there was a medical reason for denying the prison therapy); *Niemic v. Maloney*, 448 F. Supp. 2d 270, 280 (D. Mass. 2005) (finding that the denial of a medicine subsequent to a failed drug test does not violate Due Process under the 14th Amendment, especially given that a decision to deny the medicine to active drug users is in accord with medical custom).

<sup>133</sup> *Perkins v. Kansas Dep’t. of Corr.*, 165 F.3d 803, 811 (10th Cir. 1999) (upholding the denial of protease inhibitor to prisoner with HIV because other treatment was provided); *Loch v. County of Bucks*, No. 03-CV-4833, 2006 WL 2559296, at \*3, 2006 U.S. Dist. LEXIS 62620, at \*10–11 (E.D. Pa. Sept. 1, 2006), available at <http://www.paed.uscourts.gov/documents/opinions/06D1114P.pdf>, at 5 (holding that a prisoner who had been treated for conditions including MRSA did not assert a constitutional violation simply because they claim the treatment they received was inadequate).

<sup>134</sup> *Parker v. Proffit*, Civ. A. No. 94-00815-R, 1995 U.S. Dist. LEXIS 15941, at \*19 (W.D. Va. Oct. 27, 1995) (unpublished) (evaluating denial of medication by standards of medical treatment at time of denial); *Adams v. Poag*, 61 F.3d 1537, 1543 (11th Cir. 1995) (to show a prison official’s actions were deliberately indifferent, a plaintiff could produce opinions of medical experts asserting the official’s actions were contrary to contemporary accepted medical practices).

denial of medication is not an accepted practice, it may not be enough to show deliberate indifference.<sup>135</sup>

If you received medical treatment but think that a prison doctor incorrectly diagnosed your condition, it will be difficult to bring a successful case against the prison officials. In the past, courts have dismissed cases for a variety of reasons. Some of those reasons are that the prisoner could not prove that the prison officials had personal involvement,<sup>136</sup> the prisoner could not show any physical harm, or that his needs were ignored.<sup>137</sup>

If you have hepatitis C and prison officials decide that you should receive a certain treatment for a certain length of time, and you are then denied that treatment, you may have a claim under the Eighth Amendment. To bring a claim, you must be able to say that the removal from the prescribed treatment is endangering your life by failing to treat your disease.<sup>138</sup> Meeting these requirements allows you to begin your case, but does not mean that you will win. You will still need to show that there was “deliberate indifference” to your medical needs.<sup>139</sup>

This does not change the rule that courts do not like to question doctors’ medical decisions. If you have received treatment for hepatitis C but think you should have been given different treatment,<sup>140</sup> or if your doctors said you do not have a condition requiring any treatment, this rule will not allow you to sue.<sup>141</sup>

## 2. Right to Refuse Medical Treatment

Generally, you have the ability to decline medical treatment.<sup>142</sup> One exception is if the law requires you to be treated.<sup>143</sup> For example, if you test positive for TB, then you may be treated for it even if you do not wish to be treated.<sup>144</sup> This is because there is a legitimate state interest in preventing the spread of TB, which spreads easily through the air.<sup>145</sup> For diseases like HIV/AIDS that are less easily transmitted, it will be more difficult for prison officials to treat you without your consent. For more information about your right to refuse treatment, see Chapter 29, Part C, of the main *JLM*, “Special Issues for Prisoners with Mental Illness,” Chapter 23 of the main *JLM*, “Your Right to Adequate Medical Care,” and Chapter 14 of the *Louisiana State Supplement*, “Your Right to Adequate Medical Care.”

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<sup>135</sup> *Farmer v. Brennan*, 511 U.S. 825, 835, 114 S. Ct. 1970, 1978 (1994) (“While . . . deliberate indifference entails something more than mere negligence, the cases are also clear that it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.”).

<sup>136</sup> *Timmons v. N.Y. State Dep’t. of Corr. Servs.*, 887 F. Supp. 576, 580 (S.D.N.Y. 1995) (holding a prisoner bringing a claim against prison officials for misdiagnosing him in 1986 as having HIV had not shown the officials had any personal involvement in the alleged violations and was thus not entitled to relief under 42 U.S.C. § 1983). Section 1983 governs suits against prison officials for federal statutory and constitutional violations and is described in detail in the main *JLM*, Chapter 16, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law.”

<sup>137</sup> *Smith v. Carpenter*, 316 F.3d 178, 184 (2d Cir. 2003) (dismissing 8th Amendment claim because prisoner failed to show that he suffered any adverse medical effects from the sporadic lack of treatment).

<sup>138</sup> *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S. Ct. 2197 (2007) (holding that the pleading requirements of Federal Rule of Civil Procedure 8(a)(2) were met by statements that a prisoner with hepatitis C had been removed from his prescribed course of treatment and denied all treatment for his disease due to suspicion of drug use).

<sup>139</sup> *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285 (1976).

<sup>140</sup> *Loukas v. Mich. Dep’t. of Corr.*, No. 2-07-CV-142, 2008 U.S. Dist. LEXIS 14724, at \*9 (W.D. Mich. Feb. 27, 2008) (holding that a prisoner who has not been denied medical care, but simply questions whether the treatment he has been receiving is adequate, does not have an 8th Amendment claim).

<sup>141</sup> *Hix v. Tenn. Dep’t. of Corr.*, 196 Fed. App’x. 350, 357 n.1, 358 (6th Cir. 2006) (stating hepatitis C does not require treatment in all cases, and a difference of opinion over medical treatment does not violate the 8th Amendment).

<sup>142</sup> LA. REV. STAT. ANN. § 15:860 (2017).

<sup>143</sup> LA. REV. STAT. ANN. § 15:860 (2017).

<sup>144</sup> *McCormick v. Stalder*, 105 F.3d 1059, 1061–1062 (5th Cir. 1997).

<sup>145</sup> *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997).

## H. DISCRIMINATORY TREATMENT AND INFECTIOUS DISEASES

### 1. Constitutional Rights

The Fourteenth Amendment may protect you from discriminatory treatment because of having an infectious disease. For example, the Equal Protection Clause of the Fourteenth Amendment does not allow discrimination by the state that is not “rationally related to a legitimate purpose.”<sup>146</sup> The Due Process Clause of the Fourteenth Amendment forbids the prison facility from taking away your entitlements without “due process of law.”<sup>147</sup> The Eighth Amendment protects you from “cruel and unusual punishment.”<sup>148</sup> Keep in mind, however, that the courts balance these constitutional rights against legitimate penal interests,<sup>149</sup> which may allow prison officials to lawfully infringe upon your rights. Prison policies are valid if they are reasonably related to a legitimate penal interest. However, the prison is required to use the least restrictive means of achieving the goals of the policy.<sup>150</sup>

If you bring a suit challenging a prison practice under the Fourteenth Amendment’s Due Process Clause, you must prove you were entitled to something the prison took away.<sup>151</sup> Any entitlement must be created by state law. If you think you are entitled to something, you should first determine whether a state statute or regulation gives you a right to that entitlement. Also, know that prison officials can treat prisoners with infectious diseases differently from other prisoners if their reasons further legitimate penal interests.<sup>152</sup> Those reasons must be rational and not purely discriminatory.

The Fourteenth Amendment only applies to the states, but the Fifth Amendment’s Due Process Clause protects your rights against the federal government. If you are in a federal prison, you might consider bringing your lawsuit under federal statutes, instead of under the Fifth Amendment.

### 2. Statutory Rights

Certain laws protect you from forms of discrimination based on disabilities, including HIV status.

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<sup>146</sup> U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>147</sup> U.S. CONST. amend. XIV, § 1. (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>148</sup> U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

<sup>149</sup> *Turner v. Safley*, 482 U.S. 89, 107 S. Ct. 2254, (1987) (stating that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penal interests”).

<sup>150</sup> *Turner v. Safley*, 482 U.S. 78, 91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 80 (1987) (“But if an inmate claimant can point to an alternative that fully accommodates the prisoner’s rights at *de minimis* cost to valid penal interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.”). This means if a prisoner can point to a different procedure not requiring more money or time, the alternative can be used as evidence that the challenged policy is not reasonable); *Perkins v. Kan. Dep’t. of Corr.*, 165 F.3d 803, 811–812, (10th Cir. 1999) (holding HIV-positive prisoner could claim a constitutional violation for being forced to wear a face mask whenever he left his cell and noting that wearing such a mask could become a humiliating form of branding that violated the 8th Amendment’s prohibition of punishing individuals for a physical condition). *But see Parker v. Proffit*, Civ. A. No. 94-00815-R, 1995 U.S. Dist. LEXIS 15941, at \*19–21 (W.D. Va. Oct. 27, 1995) (unpublished) (stating that making an HIV-positive prisoner wear a mask and protective clothing may have caused some embarrassment, but the practice did not rise to a constitutional violation of the 8th Amendment prohibition on cruel and unusual punishment).

<sup>151</sup> *Anderson v. Romero*, 72 F.3d 518, 527 (7th Cir. 1995) (ruling a state statute directing prisons to provide “barber facilities” gave the plaintiff an entitlement to a haircut, and keeping plaintiff from this entitlement because of his HIV status deprived him of his property and liberty rights under the 14th Amendment’s Due Process Clause).

<sup>152</sup> *Laureano v. Vega*, 92 Civ. 6056 (LMM), 1994 U.S. Dist. LEXIS 2107, at \*23–24 (S.D.N.Y. Feb. 25, 1994) (unpublished), *aff’d*, 40 F.3d 1237 (2d Cir. 1994) (rejecting prisoner’s claim that he had received difficult work assignments because of his HIV status; holding that he had failed to establish any retaliatory motive by prison officials and that there is no right to a particular prison job); *Farmer v. Moritsugu*, 742 F. Supp. 525, 528 (W.D. Wis. 1990) (finding that prison had legitimate interest in maintaining security and order and therefore refusal of HIV-infected prisoner’s request for food service job was not denial of equal protection).

The Federal Rehabilitation Act of 1973 (“FRA”) prohibits discrimination or denial of programs or benefits based on disability, by a federal, state, or local government agency, or any recipient of federal funding.<sup>153</sup> Similarly, the Americans with Disabilities Act (“ADA”) prohibits public and private organizations from discriminating, excluding, or denying services, programs, or activities to a person with a disability.<sup>154</sup> These laws recognize TB and HIV infections as a form of disability because they are physical impairments limiting major life activities.<sup>155</sup> Also, in *Bragdon v. Abbott*, the Supreme Court clearly stated that under the ADA, “HIV infection satisfies the . . . definition of a physical impairment during every stage of the disease.”<sup>156</sup>

Although HIV is treated as a disability by the FRA and the ADA, your rights are limited to some extent if: (1) your HIV infection poses a significant risk to the health or safety of others; or (2) it would be an undue hardship on the prison facility to accommodate your needs.<sup>157</sup> Also, the U.S. Supreme Court has decided that individuals cannot recover money from the state for its failure to comply with the ADA.<sup>158</sup> However, you can still seek injunctive relief, which means that you can file a claim in which you ask the court to require the state to end practices that violate the ADA.<sup>159</sup>

If you are suing for violation of your statutory rights, you should cite both the FRA and the ADA, since the remedies, procedures, and rights are the same under both laws.<sup>160</sup> The only difference is the FRA only applies to public (government) entities while the ADA can support a claim against both private and public entities. You should also check the law of your state and city since sometimes states, cities, or towns enact additional laws to protect persons with contagious diseases, like HIV or hepatitis, from discrimination.

Most prison facilities are controlled and financed by federal, state, or local governments, so they are generally subject to the ADA and FRA. Furthermore, the U.S. Supreme Court has stated the ADA and FRA prohibit discrimination in the prison system.<sup>161</sup> This means prison facilities cannot exclude or deny prisoners “benefits of the services, programs, or activities of a public entity” or subject them to discrimination.<sup>162</sup> Benefits include recreational activities, medical services, and educational and vocational programs.<sup>163</sup>

However, when a court evaluates a prison policy, it will consider whether the restriction is reasonably related to a legitimate penal interest.<sup>164</sup> When a prison is defending a policy, it only has to

<sup>153</sup> 29 U.S.C. § 794(a)–(c) (2012).

<sup>154</sup> 42 U.S.C. §§ 12132, 12182 (2012).

<sup>155</sup> 42 U.S.C. § 12102(1) (2012) (“The term ‘disability’ means . . . a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such impairment; or being regarded as having such an impairment.”).

<sup>156</sup> *Bragdon v. Abbott*, 524 U.S. 624, 637, 118 S. Ct. 2196, 2204 (1998). This case concerned a dentist’s refusal to examine an HIV-infected patient in his office. Though the facts did not involve prisoners, the legal principle is the same regarding HIV infection as a disability. For a lower court decision finding an HIV-positive prisoner disabled under the FRA and ADA, see, e.g., *Dean v. Knowles*, 912 F. Supp. 519, 521 (S.D. Fla. 1996).

<sup>157</sup> *Onishea v. Hopper*, 171 F.3d 1289, 1297–1299 (11th Cir. 1999) (holding any amount of risk through a “specific and theoretically sound means of possible transmission” is a significant risk, and allowing segregation of HIV-positive prisoners).

<sup>158</sup> *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374, 121 S. Ct. 955, 968 (2001) (holding Alabama State employees could not recover damages because of state’s failure to comply with the ADA).

<sup>159</sup> *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9, 121 S. Ct. 955, 968 n.9 (2001) (“[ADA] standards can be enforced by . . . private individuals in actions for injunctive relief.”).

<sup>160</sup> 42 U.S.C. § 12133 (2012) (“The remedies, procedures, and rights set forth in [29 U.S.C. § 794(a)] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of [42 U.S.C. § 12132].”).

<sup>161</sup> *Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 213, 118 S. Ct. 1952, 1956 (1998) (“[T]he plain text of Title II of the ADA unambiguously extends to state prison inmates . . .”).

<sup>162</sup> 42 U.S.C. § 12132 (2012).

<sup>163</sup> *Pa. Dep’t. of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998).

<sup>164</sup> *Gates v. Rowland*, 39 F.3d 1439, 1447–1448 (9th Cir. 1994) (finding a legitimate penal interest allowed prison to discriminate against HIV-positive prisoners by denying them food service jobs). In *Gates*, the prison claimed that although the medical risk of infecting other prisoners through food service is admittedly small, the perception of a

show that the possibility of a risk exists; it does not have to show that the risk has actually occurred. Examples of interests cited by prison authorities include prison safety and undue financial or administrative burden.<sup>165</sup>

## I. SENTENCING PERSONS WITH INFECTIOUS DISEASES

The Louisiana state constitution and the U.S. Constitution both prohibit cruel and unusual punishment.<sup>166</sup> The Louisiana state constitution also prohibits excessive punishment.<sup>167</sup> You should know that under Louisiana law, a sentence will not be set aside as cruel and unusual unless the underlying statute is ruled unconstitutional.<sup>168</sup> This means that if the sentence complies with what a law says, then it will not be ruled cruel and unusual under Louisiana law. A sentence can be set aside if it is ruled excessive, even if it is authorized by law.<sup>169</sup> A sentence is excessive if it is out of proportion with the severity of the crime. It is also excessive if it is a purposeless infliction of pain and suffering.<sup>170</sup>

When you are sentenced, courts can consider your health. They can consider whether or not you have an infectious disease.<sup>171</sup> However, consideration of your health is at the discretion (will) of the court.<sup>172</sup> This means that the court does not have to consider your health when sentencing you. Typically, your health will affect your sentence only if you are seriously ill, like if you have advanced-stage AIDS. In addition, the court may think that other factors are more important than your health. These factors could include your prior criminal history, the nature of your crimes, and any other aggravating factors (factors that make your crime worse in the eyes of the court).<sup>173</sup>

### 1. Parole and Infectious Diseases

Before you are placed on parole, you will be tested for infectious diseases, including HIV/AIDS and hepatitis.<sup>174</sup> If you test positive, then you will be referred to counseling and appropriate medical and support services.<sup>175</sup> Your parole may require that you follow up on those referrals.<sup>176</sup> Failure to follow up on referrals for counseling and treatment may result in the revocation (taking away) of your parole.<sup>177</sup> You will not be tested if you are released early because of “good time,” unless you were originally serving a sentence for a sexual offense.<sup>178</sup>

Louisiana also permits parole for medical reasons.<sup>179</sup> To be eligible for medical parole, you have to be terminally ill or “permanently incapacitated” *and* not be a danger to yourself or society.<sup>180</sup> If you were

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risk by other prisoners could be threatening and could lead to violence. Thus, the prison interest was not in preventing the spread of HIV so much as promoting prison safety, a typical prison interest.

<sup>165</sup> *Bullock v. Gomez*, 929 F. Supp. 1299, 1305–1308 (C.D. Cal. 1996) (finding the California Men’s Colony possibly violated the ADA and the FRA when it prohibited HIV-infected prisoners from visiting their spouses in a family visiting program that permitted prisoners to visit immediate family members in private conditions for relatively extended periods of time, including overnight stays; stating that the discrimination may be justified under the standard in *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254 (1987), as a legitimate penal interest if accommodating HIV-prisoners proved to be an undue financial or administrative burden, or if the concerns of other prisoners could lead to prison violence; and noting that proof of previous prison violence is not required to prove a legitimate penal interest).

<sup>166</sup> LA. CONST. art. I, § 20; U.S. CONST. amend. VIII.

<sup>167</sup> LA. CONST. art. I, § 20.

<sup>168</sup> LA. CODE CRIM. PROC. ANN. art. 878 (2017).

<sup>169</sup> *State v. McKinney*, 94-2113, p. 5 (La. App. 4 Cir. 4/24/96); 673 So. 2d 1205, 1207.

<sup>170</sup> *State v. McKinney*, 94-2113, p. 5 (La. App. 4 Cir. 4/24/96); 673 So. 2d 1205, 1207.

<sup>171</sup> LA. CODE CRIM. PROC. ANN. art. 894.1(B)(31), (33) (2017).

<sup>172</sup> LA. CODE CRIM. PROC. ANN. art. 894.1(B) (2017).

<sup>173</sup> LA. CODE CRIM. PROC. ANN. art. 894.1(B) (2017).

<sup>174</sup> LA. REV. STAT. ANN. § 15:574.4.2(G)(1) (2017).

<sup>175</sup> LA. REV. STAT. ANN. § 15:574.4.2(G)(3) (2017).

<sup>176</sup> LA. REV. STAT. ANN. § 15:574.4.2(G)(3) (2017).

<sup>177</sup> LA. REV. STAT. ANN. § 15:574.4.2(G)(3) (2017).

<sup>178</sup> LA. REV. STAT. ANN. § 15:574.4.2(G)(5) (2017); LA. REV. STAT. ANN. § 15:571.3(B)(3) (2017).

<sup>179</sup> LA. REV. STAT. ANN. § 15:574.20 (2017).

<sup>180</sup> LA. REV. STAT. ANN. § 15:574.20(B) (2017).



convicted of first or second-degree murder, you cannot be released on medical parole.<sup>181</sup> See Chapter 35 of the main *JLM*, “Getting Out Early: Conditional & Early Release,” and Chapter 21 of the *Louisiana State Supplement*, “Parole,” for more information on medical parole.

## J. CONCLUSION

If you have AIDS, TB, hepatitis B or C, MRSA or another infectious disease, people may treat you differently due to ignorance and fear. Protect yourself. Learn about the facts of the disease and your legal rights. Because you are confined in a prison or jail, you may be subject to testing and treatment that you may not want. However, there are also laws that protect your privacy, health, and treatment preferences. In addition to the information contained in this Supplement and the main *JLM*, you should also consider contacting organizations that work with prisoners. You can find a list of national organizations in Appendix A of Chapter 26 of the main *JLM*. Appendix A to this chapter contains a list of organizations based in Louisiana that may be able to help you.

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<sup>181</sup> LA. REV. STAT. ANN. § 15:574.20(A)(2) (2017).

## APPENDIX A

### RESOURCES

**CrescentCare Legal Services (formerly AIDS Law of Louisiana, Inc.)**

2601 Tulane Ave. Suite 500

New Orleans, LA 70119

Phone: (504) 568-1631

Website: <http://crescentcarehealth.org/crescentcare/services/cc-legal-services/>

**Acadiana Legal Services Corporation**

1020 Surrey St.

Lafayette, LA 70501

Phone: (337) 237-4320 or (800) 256-1175

Fax: (337) 237-8839

Website: <http://www.la-law.org>

Email: [alsclaf@la-law.org](mailto:alsclaf@la-law.org)

**Southwest Louisiana Law Center**

1011 Lakeshore Drive, Suite 402

Lake Charles, LA 70601

Phone: (337) 436-3308

Website: <http://www.swla-law-center.com/>

**Legal Services of North Louisiana**

720 Travis Street

Shreveport, LA 71101

Phone: (318) 222-7186 or (800) 826-9265

Website: <http://www.lsnl.org/>

**Southeast Louisiana Legal Services**

P. O. Drawer 2867

Hammond, LA 70404

Phone: (800) 349-0886

Website: <http://www.slls.org/>

**ACLU of Louisiana**

P.O. Box 56157

New Orleans, LA 70156

Phone: (504) 522-0617 or (866) 522-0617

Website: [www.laaclu.org](http://www.laaclu.org)

## CHAPTER 24: YOUR RIGHT TO BE FREE FROM ILLEGAL BODY SEARCHES\*

### A. INTRODUCTION

This Chapter explains your right to be free from involuntary (not your choice) exposure of your body and illegal searches of your body. Part B explains your rights about the involuntary exposure of your naked body to members of the opposite sex and your right to the privacy of your body in general. Part C explains your right to be free from unreasonable searches of your body under the Fourth Amendment of the Federal Constitution, including what a court will think about to decide if a search of your body was reasonable and how the court will apply those factors to strip searches, body cavity searches, and cross-gender body searches. Part D explains your right to be free from cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution. Part E is about the legal “remedies” (solutions) you have if your body has been searched illegally, including filing an “administrative grievance” (complaint) and claims under 42 U.S.C. § 1983 and 28 U.S.C. § 1331.

This Chapter explains what your rights are under both federal (i.e. 5th Circuit) law and Louisiana State law. With searches of prisoners, including strip searches and body cavity searches, courts generally use the Fourth Amendment, which protects you against unreasonable searches.<sup>1</sup> Rules from the U.S. Supreme Court apply to all other U.S. courts, which include all state and federal courts. If you are in a prison outside of Louisiana, you should research the laws in your state. You should try to use the laws and court decisions of the federal circuit you are in. Louisiana is in the 5th Circuit of the federal court system, so if you are in prison in Louisiana, you should first look at cases from the 5th Circuit to figure out if a search was reasonable.

If you think your rights were violated, you should first try to protect your rights through your prison’s administrative remedy procedures. Administrative remedy procedures (ARP) are the prison’s rules for how prisoners should file a complaint. The Prison Litigation Reform Act (“PLRA”) requires you to first go through the prison grievance process before you can sue in federal court. This means that you will not be able to sue in federal court, until you have followed all of the steps of your institution’s administrative remedy procedures.

If the administrative remedy procedures aren’t able to help you, or if it does not help you enough, you then can file a lawsuit. Prisoners who challenge illegal body searches and involuntary exposure usually file claims under 42 U.S.C. § 1983 (“Section 1983”)<sup>2</sup> in either federal or state courts.

If you bring a civil suit, you can usually sue only because of physical abuse, not emotional damage. According to Section 803(d) of the PLRA, “no Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.”<sup>3</sup> So if you want to sue because of emotional damage, you first need to show that you were physically injured.

Prison officials can use the defense of “qualified immunity”<sup>4</sup> to defend against a Section 1983 lawsuit. This means that even if you can prove you were illegally searched, the officials may not be responsible under the law for their actions because of their qualified immunity defense. For more information about “qualified immunity,” see Chapter 8 of the *Louisiana State Supplement* and Chapter 16 of the main *JLM*.

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\* This Supplemental Chapter was written by Matt Cashia.

<sup>1</sup> The Fourth Amendment states that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. CONST. amend. IV.

<sup>2</sup> Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321 (1996) (codified as 18 U.S.C. § 3626 and 28 U.S.C. § 1932).

<sup>3</sup> Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, § 803(d), 110 Stat. 1321 (1996) (codified as 18 U.S.C. § 3626 and 28 U.S.C. § 1932).

<sup>4</sup> “Immunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights.” *Qualified Immunity*, Black’s Law Dictionary, 868 (10th ed., 2014).

If you want to sue because of an illegal body search, you must be specific about what happened to you during the search you are suing over. Pay attention to the cases listed in the footnotes of this chapter when deciding whether to try to use any laws and constitutional amendments in your lawsuit. Part E discusses these laws and constitutional amendments.

## B. EXPOSURE AND THE RIGHT TO PRIVACY

This Part discusses your privacy rights about your naked body. As a prisoner, you do not have many rights to privacy for your naked body.<sup>5</sup> Louisiana courts and the 5th Circuit of the U.S. Court of Appeals have said that prisoners have a reduced expectation of privacy: “Any right to privacy, including the right to bodily privacy, retained by prisoners is minimal, at best.”<sup>6</sup> Prisoners have less of a right to privacy in prison because prison officials have “legitimate governmental interests,” or important reasons that courts have recognized, that reduce prisoners’ privacy.<sup>7</sup> The right to privacy is explained in Section 5 of the Louisiana Constitution.<sup>8</sup>

### 1. Legitimate Penological Interest

Courts will support prison officials whose actions are in line with properly running the prison. So, if the prison official can show a legitimate penological,<sup>9</sup> or prison-related, reason for the action, it is probably ok to make a prisoner show their naked body.<sup>10</sup> Rules about making prisoners show their naked bodies must be “reasonably related to legitimate penological interests.”<sup>11</sup> Courts think about four things to decide if the regulation is “reasonably related”:

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<sup>5</sup> See *State v. Patrick*, 381 So. 2d 501, 503 (La. 1980) (expressly stating that an inmate’s expectation of privacy is considerably less than that of free members of society) (citing *State v. Dauzat*, 364 So. 2d 1000 (La. 1978)); see also *Oliver v. Scott*, 276 F.3d 736, 745 (5th Cir. 2002) (recognizing that a prisoner possesses a constitutional right to bodily privacy that “is minimal, at best”).

<sup>6</sup> See *State v. Patrick*, 381 So. 2d 501, 503 (La. 1980) (expressly stating that an inmate’s expectation of privacy is considerably less than that of free members of society) (citing *State v. Dauzat*, 364 So. 2d 1000 (La. 1978)); see also *Oliver v. Scott*, 276 F.3d 736, 745 (5th Cir. 2002) (recognizing that a prisoner possesses a constitutional right to bodily privacy that “is minimal, at best”).

<sup>7</sup> *Letcher v. Turner*, 968 F.2d 508, 510 (5th Cir. 1992) (cited in *Martin v. Seal*, 510 Fed. App’x. 309, 309 (5th Cir. 2013)) (dismissing prisoner’s claim of violation of right of privacy when female guards were present while prisoner was strip searched because there was a legitimate government interest in maintaining security of the facility); see also *Oliver v. Scott*, 276 F.3d 736, 744–745 (5th Cir. 2002) (stating that the strong security concerns in prison justify the surveillance of male prisoners in the showers and bathrooms by male or female guards, and stating that the Fifth Circuit is unlikely to uphold a Fourth Amendment claim for a right to bodily privacy).

<sup>8</sup> La. CONST. art. I, § 5 (“Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.”).

<sup>9</sup> “The study of penal institutions, crime prevention, and the punishment and rehabilitation of criminals, including that are to fitting the right treatment to an offender.” *Penology*, Black’s Law Dictionary, 1315 (10th ed., 2014).

<sup>10</sup> See *Oliver v. Scott*, 276 F.3d 736, 744 (5th Cir. 2002) (stating that the strong security concerns justify the surveillance of male prisoners in the showers and bathrooms by male or female guards, and stating that the Fifth Circuit is unlikely to uphold a Fourth Amendment claim for a right to bodily privacy); *Elliott v. Lynn*, 38 F.3d 188, 190–191 (5th Cir. 1994) (holding that visual cavity searches conducted on all prisoners were justified in response to an emergency situation of increasing violence in the prison and by the need for swift action).

<sup>11</sup> See *State v. Perry*, 610 So. 2d 746, 775 (La. 1992) (stating that “the proper standard for determining the validity of a prison regulation claimed to infringe on an inmate’s constitutional rights is to ask whether the regulation is reasonably related to legitimate penological interests”) (quoting *Washington v. Harper*, 494 U.S. 210, 223, 110 S. Ct. 1028, 1037, 108 L. Ed. 2d 178, 199 (U.S. 1990)); see also *Oliver v. Scott*, 276 F.3d 736, 745 (5th Cir. 2002) (stating that the strong security concerns justify the surveillance of male prisoners in the showers and bathrooms by male or female guards, and stating that the Fifth Circuit is unlikely to uphold a Fourth Amendment claim for a right to bodily privacy) (quoting *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987), superseded on other grounds by § 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA) (42 U.S.C. § 2000cc-1 (2012) (discussing the relationship between an inmate’s constitutional rights and prison regulations)).

- 1) The connection between the invasion of privacy at issue and the stated government interest;
- 2) Whether the inmate has alternative (other) methods for exercising his or her right to privacy;
- 3) What impact honoring the privacy at issue would have on other inmates, guards, and prison resources; and
- 4) What other methods, if any, the prison officials could have used to achieve their stated goal.<sup>12</sup>

An example of a prison-related interest is keeping order between prisoners. Another example is finding contraband. Contraband can include drugs or weapons.<sup>13</sup>

It is hard to claim that your right to privacy against involuntary exposure was violated just because the guard is of the opposite sex. This is because of rules about job discrimination.<sup>14</sup> These rules apply to the prison as an employer. Prohibiting guards of the opposite sex from viewing nude prisoners may violate laws requiring equal employment opportunities, because the sex of the guard would then become a factor in employment decisions. In these cases, courts will balance your right to privacy against the prison's compliance with anti-employment discrimination laws and legitimate penological objectives (prison-related goals);<sup>15</sup> however, Louisiana state courts and the 5th Circuit have held that allowing cross-sex viewing of nude prisoners does not violate the prisoners' rights.<sup>16</sup> For example, courts have rejected privacy claims

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<sup>12</sup> *Turner v. Safley*, 482 U.S. 78, 89–90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 79–80 (1987), *superseded on other grounds* by § 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1 (2012) (discussing the relationship between an inmate's constitutional rights and prison regulations).

<sup>13</sup> *See, e.g., Patin v. Leblanc*, 2012 U.S. Dist. LEXIS 106300, at \*72–74 (E.D. La. May 18, 2012) (holding that searches conducted after visitation implicate no constitutional right because they are conducted in an effort to control the entry of contraband after visits with guests, and thus are reasonably necessary to achieve legitimate penological needs); *see also Oliver v. Scott*, 276 F.3d 736, 744 (5th Cir. 2002) (stating that the strong security concerns justify the surveillance of male prisoners in the showers and bathrooms by male or female guards, and stating that the Fifth Circuit is unlikely to uphold a Fourth Amendment claim for a right to bodily privacy); *Elliott v. Lynn*, 38 F.3d 188, 190–191 (5th Cir. 1994) (holding that visual cavity searches conducted on all prisoners were justified in response to an emergency situation of increasing violence in the prison and by the need for swift action). For a definition of “contraband,” *see* LA. REV. STAT. ANN. § 14:402 (2017).

<sup>14</sup> *See, e.g., Sinclair v. Stalder*, 78 Fed. App'x. 987, 989 (5th Cir. 2003) (affirming grant of summary judgment in favor of defendant holding that assignment of female prison guards to tier duty in prison residential areas is reasonably related to legitimate penological objectives, including flexibility in security personnel staffing and equal employment opportunity); *Foster v. Coody*, 2010 U.S. Dist. LEXIS 42675, at \*8–9 (M.D. La. Mar. 29, 2010) (holding that the prison's routine staffing on female guards observing male prisoners' bathroom and shower areas is not a violation of the right to privacy where the prisoner failed to establish facts showing that searches conducted by female guards on male prisoners violates the right to privacy in the face of the prison's interest in equal employment opportunities and controlling contraband).

<sup>15</sup> *See, e.g., Sinclair v. Stalder*, 78 Fed. App'x. 987, 989 (5th Cir. 2003) (affirming grant of summary judgment in favor of defendant holding that assignment of female prison guards to tier duty in prison residential areas is reasonably related to legitimate penological objections, including flexibility in security personnel staffing and equal employment opportunity); *Guy v. Tanner*, 2012 U.S. Dist. LEXIS 61322, at \*5–7 (E.D. La. Mar. 20, 2012) (holding that viewing of plaintiff undressing, using the bathroom, and taking showers by prison guards, both male and female, implicates no protected constitutional right, but that plaintiff's claim is nonfrivolous only to the extent that he is alleging that the monitors used to view the plaintiff can be viewed by visitors and guests of the prison); *see also Oliver v. Scott*, 276 F.3d 736, 744 (5th Cir. 2002) (stating that the strong security concerns justify the surveillance of male prisoners in the showers and bathrooms by male or female guards, and stating that the Fifth Circuit is unlikely to uphold a Fourth Amendment claim for a right to bodily privacy); *West v. Parker*, No. 95-30489, 1995 U.S. App. LEXIS 42346, at \*3 (5th Cir. Aug. 23, 1995) (requiring prisoner to argue that giving a female officer “unrestricted access” to male inmate's dormitory was unnecessary to maintain security).

<sup>16</sup> *See, e.g., Foster v. Coody*, 2010 U.S. Dist. LEXIS 42675, at \*8–9 (M.D. La. Mar. 29, 2010) (holding that the prison's routine staffing on female guards observing male prisoners' bathroom and shower areas is not a violation of the right to privacy where the prisoner failed to establish facts showing that searches conducted by female guards on male prisoners violates the right to privacy in the face of the prison's interest in equal employment opportunities and controlling contraband); *see also Sinclair v. Stalder*, 78 Fed. App'x. 987, 989 (5th Cir. La. 2003) (affirming grant of summary judgment in favor of defendant; holding that assignment of female prison guards to tier duty in prison residential areas is reasonably related to legitimate penological objectives, including flexibility in security personnel staffing and equal employment opportunity).

about female guards watching male prisoners using the bathroom or showers.<sup>17</sup> Courts have also allowed female officers to go into a male prisoner's dormitory when the guards have shown a legitimate penological interest.<sup>18</sup> However, if you can show that the prison official responsible for the invasion of your privacy *did not* have a legitimate penological interest, your claim may be heard.<sup>19</sup> For example, the 5th Circuit held in *Moore* that a male prisoner's claim that he was repeatedly subject to strip and cavity searches by female staff members under non-emergency settings and while male guards were available may entitle him to relief under the Fourth Amendment.<sup>20</sup>

For information on how to make an invasion of privacy claim, *see* Part E of this Chapter.

### C. BODY SEARCHES UNDER THE FOURTH AMENDMENT

This Part talks about when and how a prison official may search your body. The Louisiana Constitution and the U.S. Constitution do not allow unreasonable searches and seizures.<sup>21</sup> These searches and seizures include strip searches and body searches of prisoners by prison guards.<sup>22</sup>

The lawfulness of a search depends on whether a prison guard acts reasonably when doing the search. In *Bell v. Wolfish*, the Supreme Court stated that body searches are constitutional, but only if performed in a "reasonable manner."<sup>23</sup> Guards must act reasonably when searching prisoners because

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<sup>17</sup> *See, e.g., Foster v. Coody*, 2010 U.S. Dist. LEXIS 42675, at \*8–9 (M.D. La. Mar. 29, 2010) (holding that the prison's routine staffing on female guards observing male prisoners' bathroom and shower areas is not a violation of the right to privacy where the prisoner failed to establish facts showing that searches conducted by female guards on male prisoners violates the right to privacy in the face of the prison's interest in equal employment opportunities and controlling contraband); *Guy v. Tanner*, 2012 U.S. Dist. LEXIS 61322, at \*5–7 (E.D. La. Mar. 20, 2012) (holding that viewing of plaintiff undressing, using the bathroom, and taking showers by prison guards, both male and female, implicates no protected constitutional right, but that plaintiff's claim is nonfrivolous only to the extent that he is alleging that the monitors used to view the plaintiff can be viewed by visitors and guests of the prison); *see also Oliver v. Scott*, 276 F.3d 736, 744 (5th Cir. 2002) (stating that the strong security concerns justify the surveillance of male prisoners in the showers and bathrooms by male or female guards, and stating that the Fifth Circuit is unlikely to uphold a Fourth Amendment claim for a right to bodily privacy); *Petty v. Johnson*, No. 98-40941, 1999 U.S. LEXIS 39736, at \*1 (5th Cir. Aug. 25, 1999) (rejecting challenge to prison policy that allowed female guards to monitor male inmates while showering or otherwise naked).

<sup>18</sup> *See, e.g., Sinclair v. Stalder*, 78 Fed. App'x. 987, 989 (5th Cir. 2003) (affirming grant of summary judgment in favor of defendant; holding that assignment of female prison guards to tier duty in prison residential areas is reasonably related to legitimate penological objectives, including flexibility in security personnel staffing and equal employment opportunity); *Lechter v. Turner*, 968 F.2d 508, 510 (5th Cir. 1992) (affirming dismissal of plaintiff inmate's civil rights action because a strip search in the presence of female guards does not violate plaintiff's constitutional right to privacy); *West v. Parker*, No. 95-30489, 1995 U.S. App. LEXIS 29536, at \*3 (5th Cir. Aug. 23, 1995) (requiring prisoner to argue that giving a female officer "unrestricted access" to male inmate's dormitory was unnecessary to maintain security).

<sup>19</sup> *See Moore v. Carwell*, 168 F.3d 234, 236–237 (5th Cir. 1994) (holding that plaintiff prisoner's § 1983 claim was not frivolous because his allegations entitled him to relief under the Fourth Amendment if true; plaintiff prisoner alleged that he was subjected to repeat strip and cavity searches by female prison guards, under non-emergency circumstances and when male officers were available); *see also Tuft v. Texas*, 410 Fed. App'x. 770, 777 (5th Cir. 2011) (remanding in part as to prisoner's claim that the sole purpose of a female officer's presence during a strip search was to sexually coerce and humiliate him).

<sup>20</sup> *Moore v. Carwell*, 168 F.3d 234, 236–237 (5th Cir. 1994) (holding that plaintiff prisoner's § 1983 claim was not frivolous because his allegations entitled him to relief under the Fourth Amendment if true; plaintiff prisoner alleged that he was subjected to repeat strip and cavity searches by female prison guards, under non-emergency circumstances and when male officers were available).

<sup>21</sup> LA. CONST. Art. I, § 5 (Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy."); U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated").

<sup>22</sup> *See, e.g., Parker v. State*, 282 So. 2d 483, 487 (La. 1973) (finding that periodic searches of both inmates and dormitory areas for weapons may be reasonable).

<sup>23</sup> *Bell v. Wolfish*, 441 U.S. 520, 560, 99 S. Ct. 1861, 1885, 60 L. Ed. 2d 447, 482 (1979).

searches invade prisoners' privacy and can easily become abusive.<sup>24</sup> In other words, courts balance the state's need for conducting the search against how much the prisoner's privacy is invaded.<sup>25</sup>

Courts do not have a strict rule as to what constitutes an unreasonable search. Rather, they have decided that some practices are unreasonable. To determine whether a search is "unreasonable," *Bell v. Wolfish* requires federal and state courts to examine three factors:

- 1) Why the prison official searched you;
- 2) Where they searched you; and
- 3) How they searched you.<sup>26</sup>

Whether a strip or body cavity search was reasonable depends on what happened, how it happened, and why it happened.<sup>27</sup> Courts balance your right to privacy with the prison officer's duty to run a safe and effective prison.<sup>28</sup>

Prison rules can block some of your constitutional rights if they are related to "legitimate penological interests."<sup>29</sup> For a definition of "legitimate penological interests," see Part B of this Chapter. The government has to justify a search when they search you.<sup>30</sup> The government usually justifies searches by saying that they are related to "security, order, and rehabilitation."<sup>31</sup> For example, a court might say that visual cavity searches of all prisoners were reasonable in an emergency when there was a threat of

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<sup>24</sup> *Bell v. Wolfish*, 441 U.S. 520, 559–560, 99 S. Ct. 1861, 1884–1886, 60 L. Ed. 2d 447, 481–483 (1979).

<sup>25</sup> See *United States v. Lilly*, 576 F.2d 1240, 1246 (5th Cir. 1978), *abrogated on other grounds by* *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984) (stating "few searches are more intrusive than a body cavity search" and applying the *Bell* factors to determine if legitimate penological interests outweigh the "intrusive scope of the search").

<sup>26</sup> *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861, 1884, 60 L. Ed. 2d 447, 481 (1979) (finding that a search of the prisoner's cell was reasonable and stating the determining whether a search is reasonable "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.").

<sup>27</sup> See, e.g., *Moore v. Carwell*, 168 F.3d 234, 237 (5th Cir. 1999) (stating that "searches and seizures conducted of prisoners must be reasonable under all the facts and circumstances in which they are performed.") (internal citations omitted).

<sup>28</sup> See, e.g., *Moore v. Carwell*, 168 F.3d 234, 237 (5th Cir. 1999) (finding that while a prisoner's rights may be diminished due to the needs or exigencies of the prison in which he is incarcerated, "searches and seizures conducted of prisoners must be reasonable under all the facts and circumstances in which they are performed" in order to avoid violating the Fourth Amendment) (internal citations omitted).

<sup>29</sup> *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987), *superseded on other grounds by* § 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1 (2012) (discussing the relationship between an inmate's constitutional rights and prison regulations); *State v. Perry*, 610 So. 2d 746, 775 (La. 1992) (stating that "when a prison regulation impinges on an inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests") (quoting *Washington v. Harper*, 494 U.S. 210, 223, 110 S. Ct. 1028, 1037, 108 L. Ed. 2d 178, 199 (U.S. 1990)); see also *Hutchins v. McDaniel*, 512 F.3d 193, 196 (5th Cir. 2007) (stating that although an inmate's "rights are diminished by the needs and exigencies of the institution in which he is incarcerated . . . [and] [h]e thus loses those rights that are necessarily sacrificed to legitimate penological needs," the "Fourth Amendment protects [him] from searches and seizures that go beyond legitimate penological interests.") (internal citations and quotations omitted).

<sup>30</sup> See *U.S. v. Lilly*, 576 F.2d 1240, 1244–1245 (5th Cir. 1978), *abrogated on other grounds by* *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, L. Ed. 2d 393 (1984) (holding that the government bears the burden of justifying a search or seizure in prison, and stating "whenever the government has invaded an individual's privacy, the government has been required to justify its invasion by proving that it was reasonable under all the facts and circumstances.") (emphasis added).

<sup>31</sup> See *White v. Sanders*, 1995 U.S. App. LEXIS 43501, at \*7 (5th Cir. Mar. 2, 1995) (stating that legitimate penological interests include security, order, and rehabilitation). See, e.g., *Elliott v. Lynn*, 38 F.3d 188, 190–191 (5th Cir. 1994) (holding that visual cavity searches conducted on all prisoners was justified in response to an emergency situation of increasing violence in the prison and by the need for swift action); *Hay v. Waldron*, 834 F.2d 481, 485–486 (5th Cir. 1987) (holding that the policy requiring a strip search of prisoners on administrative segregation is constitutional based on the interest in the security of the prison and the safety of the prisoners on segregation).

violence.<sup>32</sup> A search is more likely to be reasonable if it happens in private.<sup>33</sup> A Louisiana court said that a visual cavity search was private enough when no one else was able to see the prisoners except the officers and the prisoners being searched.<sup>34</sup> Courts also look at whether the prison officials were trying to harass or punish you.<sup>35</sup> It is harder for the government to justify some kinds of searches, like cavity searches.<sup>36</sup> The next Section of this Chapter talks about what searches courts think are unreasonable. It is organized by different kinds of searches.

The prison only has to prove that the search was reasonable.<sup>37</sup> The search might be reasonable even if there was a better way to keep prisoners safe.<sup>38</sup> It is important to remember that courts usually listen to what prison officials say about why they searched you.<sup>39</sup> If you can, you should try to prove that the prison officials are lying about why they searched you.<sup>40</sup>

### 1. Types of Searches

This Section is about your right to be free from an unreasonable (which, here, means illegal) search and seizure, and explains the types of searches that might happen to you. This includes strip searches, visual body cavity searches, and manual body cavity searches. Search and seizure means someone searches your body or your property and maybe takes (seizes) one or some of your things. DNA testing is also

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<sup>32</sup> *Elliott v. Lynn*, 38 F.3d 188, 190–191 (5th Cir. 1994) (holding that visual cavity searches conducted on all prisoners was justified in response to an emergency situation of increasing violence in the prison and by the need for swift action).

<sup>33</sup> *See, e.g., Fulford v. Regel*, 582 So. 2d 981, 984 (La. App. 1 Cir. 1991) (finding that a strip search conducted by officers inside a building where no one was present other than prison employees and the inmates was reasonable, even though the strip search was conducted in the presence of the inmates involved).

<sup>34</sup> *Fulford v. Regel*, 582 So. 2d 981, 984 (La. App. 1 Cir. 1991) (finding that a strip search conducted by officers inside a building where no one was present other than prison employees and the inmates was reasonable, even though the strip search was conducted in the presence of the inmates involved).

<sup>35</sup> *See, e.g., Fulford v. Regel*, 582 So. 2d 981, 984 (La. App. 1 Cir. 1991) (finding that because a strip search by prison officers on an inmate was not performed to harass or punish an inmate, the search was reasonable).

<sup>36</sup> *See United States v. York*, 578 F.2d 1036, 1041 (5th Cir. 1978) (stating that “[t]he more intrusive the search, the heavier is the government’s burden of proving its reasonableness,” but holding the strip and body cavity searches at issue were justified by the fact that a bag containing marijuana had fallen from the pant leg of the prisoner’s visitor moments before the search was conducted); *see also State v. Kleinpeter*, 449 So. 2d 1043, 1046 (La. App. 1 Cir. 1984) (stating that body cavity searches are intrusive and humiliating, and must be surrounded by protection which does not conflict with legitimate penological needs).

<sup>37</sup> *See Hay v. Waldron*, 834 F.2d 481, 486 (5th Cir. 1987) (stating that “[p]robable cause” is not the definitive litmus for constitutionality of prison search policies.); *Fulford v. Regel*, 582 So. 2d 981, 984 (La. App. 1 Cir. 1991) (finding that strip searches conducted on prisoners without reasonable suspicion or probable cause do not violate the U.S. constitution or Louisiana constitution so long as the searches are conducted in a reasonable manner); *State v. Guirlando*, 509 So. 2d 172, 174 (La. App. 1 Cir. 1987) (finding that even though the state demonstrated particular justification for a search, such a justification was constitutionally unnecessary, as inmates have no expectation of privacy of their items).

<sup>38</sup> *See Hay v. Waldron*, 834 F.2d 481, 485 (5th Cir. 1987) (denying the inmate’s claim that the strip search procedure was in violation of the Fourth Amendment, stating that a court does not have to apply a least restrictive means standard when reviewing the security policies adopted by prison officials) (citing *Block v. Rutherford*, 468 U.S. 576, n.11, 104 S. Ct. 3227, n.11, 82 L. Ed. 2d 438 (1984)) (stating that “administrative officials are not obliged to adopt the least restrictive means to meet their legitimate objectives”).

<sup>39</sup> *See, e.g., Hay v. Waldron*, 834 F.2d 481, 486 (5th Cir. 1987) (stating that the policy requiring a strip search of prisoners on administrative segregation is constitutional based on the interest in the security of the prison and the safety of the prisoners on segregation; stating that prison officials deserve deference “regarding the reasonableness of the scope, the manner, the place and the justification for a particular policy” based on the interest of internal security) (internal citations omitted); *Elliot v. Lynn*, 38 F.3d 188, 191 (5th Cir. 1994) (stating that in the Fourth Amendment Context, “a prison administrator’s decisions and actions in the prison context are entitled to great deference from the courts, the burden of proving reasonableness is a light burden”).

<sup>40</sup> *See Hay v. Waldron*, 834 F.2d 481, 486 (5th Cir. 1987) (holding that “[i]f a policy is reasonably related to legitimate security objectives and there is no substantial evidence to indicate that prison officials have exaggerated their response to security considerations, courts ordinarily should defer to prison administrators’ expertise”) (emphasis added).



discussed. A strip search is when your naked body is searched, but your body cavities are not.<sup>41</sup> A body cavity search can be visual or manual. A visual body cavity search means the searcher looks into your anal or genital areas without touching you. A manual body search is when the searcher uses some touching, with his hands or an instrument, to search your anal or genital areas.

Before you make a Fourth Amendment unreasonable search and seizure claim, you should check your jail or prison's rules about the types of searches and the reasons that a search is used. But know that such a policy is just a suggestion for the court in deciding if the search was okay. This means the court can disagree with it.<sup>42</sup>

#### a. Strip Search

In a strip search, you take your clothes off. Then, a prison official searches the clothes and checks your naked body to see if you are hiding anything. In a strip search, the prison official does not touch you or search your body. The courts usually allow a strip search if it was done in a reasonable manner.<sup>43</sup> Courts usually allow strip searches if prison officials have a real security reason to explain the search. This might be because there has been a lot of violence at the prison or when prisoners have had contact with visitors from outside of prison.<sup>44</sup> However, if a strip search is just done to bother prisoners, and there are no real security concerns, it may violate the Fourth or Eighth Amendment.<sup>45</sup>

A court will balance the need for a search with how much it violated your rights.<sup>46</sup> It is the state's job to show that the search was reasonable and done because of a real prison need. A strip search does not need to be based on probable cause, which means the prison actually thought you were breaking the rules or doing something illegal.<sup>47</sup> Courts usually let prison officials pick how they do a search and what types of

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<sup>41</sup> "A search of a suspect whose clothes have been removed, the purpose usually being to find any contraband the person might be hiding." *Strip Search*, Black's Law Dictionary, 1553 (10th ed., 2014).

<sup>42</sup> See *Florence v. Bd. Of Chosen Freeholders*, 566 U.S. 318, 527, 132 S. Ct. 1510, 1517, 182 L. Ed. 2d 566, 576 (2012) (stating that the task of determining whether a policy is reasonably related to legitimate security interests is peculiarly within the province and professional expertise of corrections officials, but that in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment); *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64 (1987), *superseded on other grounds* by § 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1 (2012) (discussing the relationship between an inmate's constitutional rights and prison regulations).

<sup>43</sup> See, e.g., *Fulford v. Regel*, 582 So. 2d 981, 984 (La. App. 1 Cir. 1991) (finding that strip searches conducted on prisoners without reasonable suspicion or probable cause do not violate the U.S. constitution or Louisiana constitution so long as the searches are conducted in a reasonable manner).

<sup>44</sup> See, e.g., *Elliott v. Lynn*, 38 F.3d 188, 190–191 (5th Cir. 1994) (holding that visual cavity searches conducted on all prisoners was justified in response to an emergency situation of increasing violence in the prison and by the need for swift action); *United States v. York*, 578 F.2d 1036, 1041 (5th Cir. 1978) (upholding strip searches of prisoner after a visit with a person from outside the prison as reasonable upon finding balloons containing marijuana on his visitor's person).

<sup>45</sup> See *Moore v. Carwell*, 168 F.3d 234, 236–237 (5th Cir. 1999) (holding that plaintiff prisoner's § 1983 claim was not frivolous because his allegations entitled him to relief under the Fourth Amendment if true; plaintiff prisoner alleged that he was subjected to repeat strip and cavity searches by female prison guards under non-emergency circumstances and when male officers were available); see also *Tuft v. Texas*, 410 Fed. App'x 770, 777 (5th Cir. 2011) (remanding in part as to prisoner's claim that the sole purpose of a female officer's presence during a strip search was to sexually coerce and humiliate him).

<sup>46</sup> See *Hutchins v. McDaniels*, 512 F.3d 193, 196 (5th Cir. 2007) (holding that a claim that strip searches and cavity searches conducted within view of other prisoners and female body guards without the justification that the prisoner was suspected of possessing contraband *may be unreasonable*, stating "[t]he test for a Fourth Amendment violation requires the balancing of the need for the particular search and the invasion of rights that are a result of the search").

<sup>47</sup> See *Hay v. Waldron*, 834 F.2d 481, 485 (5th Cir. 1987) (rejecting a least restrictive means and probable cause standard for searches and noting that the United States Supreme Court has rejected the argument that a strip search must be based on probable cause) (citing *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861, 1884, 60 L. Ed. 2d 447, 481 (1979)); see also *Fulford v. Regel*, 582 So. 2d 981, 984 (La. App. 1 Cir. 1991) (finding that strip searches conducted on prisoners without reasonable suspicion or probable cause do not violate the U.S. constitution or Louisiana constitution so long as the searches are conducted in a reasonable manner).

searches are needed to reach their goal.<sup>48</sup> This means prison policies requiring a regular strip search of a group of prisoners are often upheld.<sup>49</sup>

#### b. Body Cavity Search

A body cavity search is an actual physical examination of the prisoner's anal and/or genital cavities conducted by a professional member of the health services staff.<sup>50</sup> Body cavity searches can either be visual or manual. In a visual body cavity search, sometimes referred to as a "strip frisk," a prison official performs a visual search of a prisoner's clothes and body. This may include looking at body cavities. This may involve one or more of the following procedures:

- 1) Opening the mouth and moving the tongue up and down and from side to side;
- 2) Removing any dentures;
- 3) Running the prisoner's hands through the prisoner's hair;
- 4) Visually examining the prisoner's ears;
- 5) Lifting the prisoner's arms to expose the armpits;
- 6) Bending over and/or spreading the buttocks to expose the anus to the frisking officer;
- 7) For male prisoners, spreading the testicles to expose the area behind the testicles; or
- 8) For female prisoners, squatting to show the vagina.

While a visual body cavity search does not involve the touching of a prisoner by a prison official, in a manual body cavity search a prison official places his or her fingers or other instruments into a prisoner's nose, mouth, anus, and/or vagina. A body cavity search of prisoners by prison officials is subject to the federal and state constitutional protections against unreasonable searches, but a court will determine the search reasonable unless the law enforcement interests of the officials is sufficiently outweighed by the violation of the prisoner's privacy rights.<sup>51</sup> Because manual body cavity searches involve a higher level of intrusiveness than visual body cavity searches, courts may want a greater reason to justify a manual body cavity search in order to find the search reasonable.

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<sup>48</sup> See *Hay v. Waldron*, 834 F.2d 481, 486 (5th Cir. 1987) (stating that the policy requiring a strip search of prisoners on administrative segregation is constitutional based on the interest in the security of the prison and the safety of the prisoners in segregation; stating that prison officials deserve deference "regarding the reasonableness of the scope, the manner, the place and the justification for a particular policy" based on the interest of internal security) (internal citations omitted); *Elliot v. Lynn*, 38 F.3d 188, 191 (5th Cir. 1994) (stating that in the Fourth Amendment context, "a prison administrator's decisions and actions in the prison context are entitled to great deference from the courts, and the burden of proving reasonableness is a light burden.").

<sup>49</sup> See, e.g., *Hay v. Waldron*, 834 F.2d 481, 486 (5th Cir. 1987) (denying the inmate's § 1983 claim that the strip search procedure was in violation of the 4th Amendment because the procedure was applied to inmates in segregation for security detention, pre-hearing detention, protective custody or emergency detention with the purpose of "prevent[ing] the transfer or concealment of prison contraband"); *Fulford v. Regel*, 582 So. 2d 981, 984 (La. App. 1 Cir. 1991) (finding that strip searches conducted on prisoners without reasonable suspicion or probable cause do not violate the U.S. constitution or Louisiana constitution so long as the searches are conducted in a reasonable manner).

<sup>50</sup> See, e.g., 28 C.F.R. § 552.11(d) (2017) (defining "digital or simple instrument search" as an "inspection for contraband or any other foreign item in a body cavity of an inmate by use of fingers or simple instruments, such as an otoscope, tongue blade, short nasal speculum, and simple forceps," but declaring that the search "may be conducted only by designated qualified health personnel").

<sup>51</sup> See *State v. Bullock*, 95-KA-0324, p. 6 (La. App. 4. Cir. 9/15/95); 661 So. 2d 1074, 1077 (stating that a body cavity search performed at the time of arrest at a correctional facility was reasonable under the *Be/I* factors in order to prevent contraband from entering the correctional facility); *Hutchins v. McDaniel*, 512 F.3d 193, 196 (5th Cir. 2007) (stating that although an inmate's "rights are diminished by the needs and exigencies of the institution in which he is incarcerated . . . [and] [h]e thus loses those rights that are necessarily sacrificed to legitimate penological needs," the "Fourth Amendment protects [him] from searches and seizures that go beyond legitimate penological interests.") (internal citations and quotations omitted); *United States v. York*, 578 F.2d 1036, 1041 (5th Cir. 1978) (stating that the more intrusive the search, the heavier the government's burden of showing its reasonableness); *State v. Kleinpeter*, 449 So. 2d 1043, 1046 (La. App. 1 Cir. 1984) (stating that body cavity searches are intrusive and humiliating, and must be surrounded by protection which does not conflict with legitimate penological needs).

It is not necessary that the court find that each of the *Bell* factors to be reasonable, but instead courts decide whether a search was reasonable based on the “totality of the circumstances” (meaning all the facts).<sup>52</sup> Although courts know that visual and manual body cavity searches are “among the most intrusive of searches,”<sup>53</sup> the search will likely be considered reasonable if the other *Bell* factors outweigh the intrusiveness of the search.<sup>54</sup> That is, if the intrusion of a body cavity search is outweighed by the law enforcement reason for needing to do the search.<sup>55</sup> To determine this, courts consider whether the officer that did the search had done this type of search before or whether the officer was supervised or assisted by medical personnel.<sup>56</sup> To decide if the location of the search was reasonable, the court will consider, for example, whether the search was conducted in a hygienic environment and whether it was conducted in a public place.<sup>57</sup> A search in prison requires less justification because prisoners have a lower expectation of privacy under the Fourth Amendment.<sup>58</sup>

c. Body Search by Someone of the Opposite Gender

There is no constitutional violation when a naked male prisoner is viewed by a female guard if the presence of female guards is necessary to protect a legitimate government interest, such as maintaining prison security.<sup>59</sup> Female prison guards also may do physical searches of male prisoners when there is a

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<sup>52</sup> See, e.g., *United States v. Lilly*, 576 F.2d 1240, 1246 (5th Cir. 1978) (stating “few searches are more intrusive than a body cavity search” and applying the *Bell* factors to determine if legitimate penological interests outweigh the “intrusive scope of the search”).

<sup>53</sup> See *United States v. York*, 578 F.2d 1036, 1041 (5th Cir. 1978) (stating that the more intrusive the search, the heavier the government’s burden of showing its reasonableness); see also *United States v. Lilly*, 576 F.2d 1240, 1246 (5th Cir. 1978) (stating “few searches are more intrusive than a body cavity search” and applying the *Bell* factors to determine if legitimate penological interests outweigh the “intrusive scope of the search”).

<sup>54</sup> *United States v. Caldwell*, 750 F.2d 341, 343 (5th Cir. 1984) (Permitting visual and manual body cavity search, stating that “the usual standards that apply to such searches outside the prison may be severely weakened inside the prison. Indeed, prisoners’ rights often may be diminished by the needs and exigencies of the prison environment.”). *But see* *State v. Kleinpeter*, 449 So. 2d 1043, 1046 (La. App. 1 Cir. 1984) (stating that body cavity searches are intrusive and humiliating, and must be surrounded by protection which does not conflict with legitimate penological needs).

<sup>55</sup> See *Hutchins v. McDaniel*, 512 F.3d 193, 196 (5th Cir. 2007) (stating that although an inmate’s “rights are diminished by the needs and exigencies of the institution in which he is incarcerated . . . [and] he thus loses those rights that are necessarily sacrificed to legitimate penological needs,” the “Fourth Amendment protects [him] from searches and seizures that go beyond legitimate penological interests”) (internal citations and quotations omitted).

<sup>56</sup> See *United States v. Lilly*, 576 F.2d 1240, 1247 (5th Cir. 1978) (noting that body cavity search of female was conducted by a female medical officer in the prison clinic in the presence of only the medical officer and a female correctional officer).

<sup>57</sup> *McGee v. State*, 105 S.W.3d 609, 617 (Tex. Crim. App. 2003), *reh’g on petition for discretionary review denied*, (June 11, 2003) (holding that because the search was done with rubber gloves and did not involve penetration of the anus, the location of the search at the fire station was permissible even though it was not as sanitary as a hospital; also stating that visual body cavity inspections should not be conducted in a public place, and even if search is not in a separate room, an officer should conduct himself so as to protect the privacy interests of the party being searched).

<sup>58</sup> See, e.g., *United States v. York*, 578 F.2d 1036, 1041 (5th Cir. 1978) (holding that a body cavity search of an inmate after a visit was reasonable where moments before the search a balloon containing marijuana had fallen from the inmate’s pants); *Elliott v. Lynn*, 38 F.3d 188, 190–191 (5th Cir. 1994) (holding that the group, institution-wide visual cavity search conducted in view of others did not violate the Fourth Amendment, because there were sufficient exigent circumstances, namely to regain control, discipline, and security in an emergency circumstance).

<sup>59</sup> See, e.g., *Letcher v. Turner*, 968 F.2d 508, 510 (5th Cir. 1992) (holding that the presence of female guards during the strip search of a male prisoner following a disturbance does not violate his constitutional right to privacy); *Oliver v. Scott*, 276 F.3d 736, 744 (5th Cir. 2002) (stating that the strong security concerns justify the surveillance of male prisoners in the showers and bathrooms by male or female guards, and stating that the Fifth Circuit is unlikely to uphold a Fourth Amendment claim for a right to bodily privacy); *Sinclair v. Stalder*, 78 Fed. App’x 987, 989 (5th Cir. 2003) (affirming grant of summary judgment in favor of defendant holding that assignment of female prison guards to tier duty in prison residential areas is reasonably related to legitimate penological objections, including flexibility in security personnel staffing and equal employment opportunity); *Petty v. Johnson*, No. 98-40941, 1999 U.S. LEXIS 22626, at \*1 (5th Cir. Aug. 25, 1999) (rejecting challenge to prison policy that allowed female guards to monitor male inmates while showering or otherwise naked); *Foster v. Coody*, 2010 U.S. Dist. LEXIS 42675, at \*8–9 (M.D. La. Mar. 29, 2010) (holding that the prison’s routine staffing on female guards observing male prisoners’ bathroom and shower areas is not a violation of the right to privacy where the prisoner failed to establish facts showing that searches conducted by female guards on male prisoners violates the right to privacy in the face of the prison’s interest in equal employment opportunities and controlling contraband).

legitimate government interest.<sup>60</sup> The Fifth Circuit has indicated that a strip or body cavity search of a male prisoner by a female guard requires both a legitimate government interest and a showing of necessity for the female guard to do the search.<sup>61</sup>

Although most searches of male inmates by female prison officials have been found reasonable, in *Moore v. Carwell*, the court stated that a non-emergency strip search of a male prisoner by a female prison official, when male prison officials were available, may state a potential Fourth Amendment violation.<sup>62</sup>

Courts may be more sympathetic to female prisoners. Some courts recognize that women have a greater privacy interest in certain situations. This is because female prisoners can be at a greater risk of sexual abuse by prison officials. As a result, some courts have found some searches of women prisoners by male prison officials to be unconstitutional, even if the same searches of male prisoners by female prison officials would be allowed under the same circumstances.

Courts will balance a prisoner's limited right to be free from invasions of privacy by members of the opposite sex with the state's interest in the security of the prison and in avoiding sex discrimination in prison employment.<sup>63</sup> Most cases about gender issues in prison focus on this right to privacy and try to balance these interests.

#### d. DNA Testing

Prison officials may require you to provide blood samples or other specimens to create a DNA record and this likely does not violate your state and federal rights to be free from unreasonable search and seizure.<sup>64</sup> Under Louisiana state law, you have to give a DNA sample either by court order or if you have been arrested for any felony or other specified offense, including: an attempt, conspiracy, criminal solicitation, or accessory.<sup>65</sup>

Forced DNA testing of prisoners usually does not violate the Fourth Amendment.<sup>66</sup>

### D. EIGHTH AMENDMENT PROTECTIONS

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<sup>60</sup> See *Letcher v. Turner*, 968 F.2d 508, 510 (5th Cir. 1992) (Stating “that female guards may, in addition to monitoring male prisoners during showers, conduct ‘pat’ searches of male inmates”).

<sup>61</sup> See, e.g., *Foster v. Coody*, 2010 U.S. Dist. LEXIS 42675, at \*8–9 (M.D. La. Mar. 29, 2010) (holding that the prison's routine staffing on female guards observing male prisoners' bathroom and shower areas is not a violation of the right to privacy where the prisoner failed to establish facts showing that searches conducted by female guards on male prisoners violates the right to privacy in the face of the prison's interest in equal employment opportunities and controlling contraband). But see *Moore v. Carwell*, 168 F.3d 234, 236 (5th Cir. 1999) (holding that a strip search of a male prisoner by a female officer without emergency circumstances, when male officers were available to conduct the search, could state a potential Fourth Amendment claim).

<sup>62</sup> *Moore v. Carwell*, 168 F.3d 234, 236 (5th Cir. 1999) (holding that a strip search of a male prisoner by a female officer without emergency circumstances, when male officers were available to conduct the search, could state a potential Fourth Amendment claim).

<sup>63</sup> See, e.g., *Sinclair v. Stalder*, 78 Fed. App'x. 987, 989 (5th Cir. 2003) (affirming grant of summary judgment in favor of defendant holding that assignment of female prison guards to tier duty in prison residential areas is reasonably related to legitimate penological objections, including flexibility in security personnel staffing and equal employment opportunity).

<sup>64</sup> See LA. REV. STAT. ANN. § 15:609 (2017); see also *Velasquez v. Woods*, 329 F.3d 420, 421 (5th Cir. 2003) (rejecting a § 1983 claim that requiring convicted felons to provide blood samples under TEX. GOV. CODE § 411.148 is a violation of the Fourth Amendment, and finding that “[e]very circuit court to consider this issue has held that the collection of DNA samples from felons pursuant to similar statutes does not violate the Fourth Amendment”).

<sup>65</sup> LA. REV. STAT. ANN. § 15:609 (2017).

<sup>66</sup> *Groce v. United States Dep't. of Justice*, 354 F.3d 411, 413–414 (5th Cir. 2004) (per curiam) (“[A]lthough collection of DNA samples from prisoners implicates Fourth Amendment concerns, such collections are reasonable in light of an inmates' diminished privacy rights, the minimal intrusion involved, and the legitimate government interest in using DNA to investigate crime . . . persons incarcerated after conviction retain no constitutional privacy interest against their correct identification.”).

The Eight Amendment of the Constitution and Article 1, Section 20 of the Louisiana Constitution prohibit cruel and unusual punishment.<sup>67</sup> For issues about poor prison conditions, federal courts find for state prisoners only when it is shown that the prisoners are subjected to cruel and unusual punishment, as prohibited by the Eight Amendment.<sup>68</sup>

Courts usually use the Fourth Amendment to determine if a body search is constitutional,<sup>69</sup> but may use the Eighth Amendment if the search is so unreasonable that it rises to the level of cruel and unusual punishment.

There is no clear standard about how much pain and suffering is required to show an Eighth Amendment violation. To bring an Eighth Amendment claim for cruel and unusual punishment from a body search, you must prove that the body search showed a “wanton or deliberate indifference” to your rights.<sup>70</sup> Prison officials’ conduct must meet this standard before a court will find a constitutional violation under the Eighth Amendment. To decide if prison officials showed wanton or deliberate indifference, courts may consider:

- 1) Whether, and to what extent, prison officials knew of the condition at issue;
- 2) Whether prison officials made any effort to change the condition or remove the prisoner from being subject to the condition; and
- 3) What, if anything, prison officials could have done to prevent the condition at issue.<sup>71</sup>

An Eighth Amendment claim requires action by a prison official or a condition of your confinement that was applied for a penal or disciplinary purpose and authorized or consented to by prison officials.<sup>72</sup> A court will consider all of the facts of your incarceration to decide if the prison’s action is enough to violate the Eighth Amendment.<sup>73</sup> Courts haven’t found a lot of Eight Amendment violations because of a search or assault, but successful cases have been brought.<sup>74</sup>

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<sup>67</sup> See LA CONST. art. I § 20 (Prohibiting euthanasia, torture, cruel, excessive, or unusual punishment); U.S. CONST. amend. VIII.

<sup>68</sup> See *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (“The treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.”); *Ruiz v. Estelle*, 650 F.2d 555, 559 (5th Cir. 1981) (“The federal courts may interfere only to protect prisoners against cruel and unusual treatment, because that is prohibited by the Eighth and Fourteenth Amendments of the United States Constitution.”); *Gates v. Cook*, 376 F.3d 323, 332 (5th Cir. 2004) (“The treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.”).

<sup>69</sup> See *Waddleton v. Jackson*, 445 Fed. App’x. 808, 808 (5th Cir. 2011) (stating that inmates may bring claims alleging searches that violated the 8th Amendment, but in the 5th Circuit, these claims are properly considered under the 4th Amendment); see also *Hutchins v. McDaniels*, 512 F.3d 193, 198 (5th Cir. 2007) (holding that a claim that strip searches and cavity searches conducted within view of other prisoners and female body guards without the justification that the prisoner was suspected of possessing contraband is a potential unreasonable search in violation of the Fourth Amendment); *Moore v. Carwell*, 168 F.3d 234, 237 (5th Cir. 1999) (refusing to extend the Eighth Amendment to strip searches, noting that a complaint about a strip search is properly analyzed under the Fourth Amendment).

<sup>70</sup> See *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (“Among ‘unnecessary and wanton’ inflictions of pain are those that are totally without penological justification.”) (citation omitted); *Wilson v. Seiter*, 501 U.S. 294, 302 111 S. Ct. 2321, 2326 115 L. Ed. 2d 271, 281 (1991) (holding that prisoner claiming that conditions of confinement constituted cruel and unusual punishment must show deliberate indifference on the part of prison officials).

<sup>71</sup> See *McCord v. Maggio*, 927 F.2d 844, 847–849 (5th Cir. 1991) (“The wantonness of the action depends on factors such as (1) the extent to which the official knew of the unsanitary conditions and that the prisoner was being exposed to them; (2) what steps the official took to correct the conditions or remove the prisoner from them; and (3) what the official could have done to protect the prisoner from the conditions.”).

<sup>72</sup> See *George v. Evans*, 633 F.2d 413, 415 (5th Cir. 1980) (holding the isolated act of a beating by a prison guard did not qualify as “punishment,” stating an 8th Amendment violation requires either state action or apparent authorization of conduct applied for disciplinary purposes to qualify as “punishment”).

<sup>73</sup> See, e.g., *Stewart v. Winter*, 669 F.2d 328, 335–336 (5th Cir. 1982) (holding that courts must “make a detailed inquiry” in to all the conditions of confinement to determine if they violate “contemporary standards of decency”) (citing *Rhodes v. Chapman*, 452 U.S. 337, 362–363, 101 S. Ct. 2392, 2407 69 L. Ed. 2d 59, 79 (1981)).

<sup>74</sup> See, e.g., *See George v. Evans*, 633 F.2d 413, 415 (5th Cir. 1980) (holding the isolated act of a beating by a prison guard did not qualify as “punishment,” stating an 8th Amendment violation requires either state action or apparent

To decide if excessive force was used, a court will look into whether prison officials used force in “good faith” or “maliciously and sadistically to cause harm.”<sup>75</sup> To decide if excessive force was used, the Fifth Circuit has considered:

- 1) The stated need for the use of force;
- 2) The relationship between the need and amount of force used;
- 3) The reasonable perceived threat to the prison official; and
- 4) What efforts, if any, were made by the prison official to reduce or limit the amount of force used.<sup>76</sup>

The court will compare the amount of your injuries<sup>77</sup> to the reason for the use of force.<sup>78</sup> Generally, courts allow strip and cavity searches when a prison official acts to further a penal interest and the pain suffered by the inmate is incidental to (and not the purpose of) the procedure.<sup>79</sup> For example, in *Hamer v. Jones*,<sup>80</sup> a male prisoner refused to be strip searched by a female officer. The prison had a policy of not allowing cross-sex strip searches. While officers tried to hold down the prisoner, the prisoner was injured and then needed medical help. The court ruled that because the prisoner was unable to show that the prison officials used excessive force and because the prison officials gave a legitimate interest, there was no constitutional violation.

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authorization of conduct applied for disciplinary purposes to qualify as “punishment.”); *Hamer v. Jones*, 364 Fed. App’x. 119, 123 (5th Cir. 2010) (holding that an inmate who refused a strip search by a female officer, which was a violation of prison policy, and was subsequently restrained, resulting in injury requiring hospitalization, did not achieve a valid Eighth Amendment claim because the plaintiff was unable to show excessive force because he could not disprove that such force was implemented in good faith to maintain or restore discipline, or maliciously and sadistically to cause harm) (citing *Eason v. Holt*, 73 F.3d 600, 602–603 (5th Cir. 1996)).

<sup>75</sup> *Hudson v. McMillian*, 503 U.S. 1, 6–7, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992); *see also* *David v. Hill*, 401 F. Supp. 2d 749, 759 (S.D. Tex. 2005) (“Excessive or unprovoked violence and brutality inflicted by prison guards upon inmates violates the Eighth Amendment.”).

<sup>76</sup> *Hudson v. McMillian*, 503 U.S. 1, 7, 112 S. Ct. 995, 999 117 L. Ed. 2d 156, 166 (1992). *See* *McCreary v. Massey*, 366 Fed. App’x. 516, 517–518 (5th Cir. 2010) (applying the *Hudson* test to dismiss a claim of excessive force during a handcuffed exchange resulting in a dislocated shoulder); *Valencia v. Wiggins*, 981 F.2d 1440, 1447 (5th Cir. 1993) (stating the appropriate inquiry is “whether the measure taken inflicted unnecessary and wanton pain and suffering” and “whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm”); *Rankin v. Klevenhagen*, 5 F.3d 103, 108 (5th Cir. 1993) (where the order to remove prisoner from control of officer exerting force tempered severity of response, but tended to indicate that first officer was exercising unnecessary force).

<sup>77</sup> *See Hudson v. McMillian*, 503 U.S. 1, 7, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156, 166 (1992) (absence of serious injury does not end constitutional inquiry); *Luciano v. Galindo*, 944 F.2d 261, 264 (5th Cir. 1991) (permitting claim that guard pushed handcuffed prisoner down stairs, even though resulting injuries were transient).

<sup>78</sup> *See, e.g., Hamer v. Jones*, 364 Fed. App’x. 119, 123 (5th Cir. 2010) (holding that an inmate who refused a strip search by a female officer, which was a violation of prison policy, and was subsequently restrained, resulting in injury requiring hospitalization, did not achieve a valid eighth amendment claim because the plaintiff was unable to show excessive force because he could not disprove that such force was implemented in good faith to maintain or restore discipline, or maliciously and sadistically to cause harm) (citing *Eason v. Holt*, 73 F.3d 600, 602–603 (5th Cir. 1996)).

<sup>79</sup> *See, e.g., Hamer v. Jones*, 364 Fed. App’x. 119, 123 (5th Cir. 2010) (holding that an inmate who refused a strip search by a female officer, which was a violation of prison policy, and was subsequently restrained, resulting in injury requiring hospitalization, did not achieve a valid Eighth Amendment claim because the plaintiff was unable to show excessive force because he could not disprove that such force was implemented in good faith to maintain or restore discipline, or maliciously and sadistically to cause harm) (citing *Eason v. Holt*, 73 F.3d 600, 602–603 (5th Cir. 1996)); *Elliott v. Lynn*, 38 F.3d 188, 191 n.3 (5th Cir. 1994) (holding that visual cavity searches conducted on all prisoners was justified in response to an emergency situation of increasing violence in the prison and by the need for swift action).

<sup>80</sup> *See, e.g., Hamer v. Jones*, 364 Fed. App’x. 119, 123 (5th Cir. 2010) (holding that an inmate who refused a strip search by a female officer, which was a violation of prison policy, and was subsequently restrained, resulting in injury requiring hospitalization, did not achieve a valid Eighth Amendment claim because the plaintiff was unable to show excessive force; plaintiff could not disprove that such force was implemented in good faith to maintain or restore discipline, or maliciously and sadistically to cause harm) (citing *Eason v. Holt*, 73 F.3d 600, 602–603 (5th Cir. 1996)).

Although other circuits have permitted Eight Amendment claims from excessive use of force in conducting a strip or body cavity search, no Louisiana or 5th Circuit cases have been successfully brought.<sup>81</sup>

### E. LEGAL REMEDIES

This Part talks about the legal remedies you can use for constitutional violations from illegal body searches. Section 1 describes the administrative grievance you must first file before seeking court relief. Section 2 describes the federal laws you may use in your suit. As a prisoner, you may file your claim under Title 15 of the Louisiana Revised Statutes *in forma pauperis*.<sup>82</sup> Your claim may be dismissed if the allegation of poverty is untrue or the action or appeal:

- 1) Is frivolous;
- 2) Is malicious;
- 3) Fails to state a cause of action;
- 4) Seeks monetary relief against a defendant who is immune from such relief (you sue someone you can't sue); or
- 5) Fails to state a claim upon which relief can be granted.<sup>83</sup>

It is hard to win a suit on a privacy, Fourth Amendment, or Eighth Amendment claim about a body search of a prisoner. Because your claim will be dismissed if the court decides that you probably won't win because of any of the reasons above, you should only make a state or federal claim if other cases support your suit and if you can prove the facts of your claim.

Different laws apply in state and federal prisons. If you are in a federal prison, it does not matter what state the prison is in. Federal prisons only use federal law. If you are in a state prison, you can use both state and federal laws. But remember that each state creates its own laws. You must research the laws of your particular state and how prisoners in your state file suits in that state's courts. Federal Constitutional rights are protected both in state and federal prison, but the way you present your case—what legal claims you make and how you make them—will be different.

#### 1. Administrative Grievances

You must file an administrative grievance before seeking any further remedies, like suing in court.<sup>84</sup> Before making an administrative grievance, you should review your prison's rules and regulations about body searches. Your prison facility is required to provide you with the rules and regulations governing your conduct.<sup>85</sup> If you are not satisfied with the outcome of your administrative grievance or if you believe there has been a violation of your constitutional rights, you may bring a constitutional suit, which is detailed in Section 2 of this Part.

#### 2. The Prison Litigation Reform Act, § 1983 Claims, and *Bivens* Actions

If you think that prison officials have violated your Eighth or Fourth Amendment rights, you may sue the officials or guards using 42 U.S.C. § 1983. Section 1983 is a federal law that allows you to sue state

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<sup>81</sup> See, e.g., *Waddleton v. Jackson*, 455 Fed. App'x. 808, 808 (5th Cir. 2011) (stating that inmates may bring claims alleging searches violated the 8<sup>th</sup> Amendment, but in the 5<sup>th</sup> Circuit these claims are properly considered under the 4<sup>th</sup> Amendment).

<sup>82</sup> See LA. REV. STAT. ANN. § 15:1186 (2017).

<sup>83</sup> See LA. REV. STAT. ANN. § 15:1186(C) (2017) (“[T]he court shall dismiss the case at any time if the court determines that the allegation of poverty is untrue, or the action or appeal is frivolous, is malicious, fails to state a cause of action, seeks monetary relief against a defendant who is immune from such relief, or fails to state a claim upon which relief can be granted.”).

<sup>84</sup> See LA. REV. STAT. ANN. § 15:1184(A)(2) (2017).

<sup>85</sup> See LA. REV. STAT. ANN. § 15:829 (2017).

officials who have violated your constitutional rights while acting “under color of state law.”<sup>86</sup> You can also use Section 1983 to sue local officials as long as you can show that they too acted under “color of state law.” You can only sue municipalities (towns, cities, or counties) under 42 U.S.C. § 1983 if your injury was the result of an official municipal policy or custom.<sup>87</sup>

You can sue federal officials in a similar suit, called a *Bivens* action.<sup>88</sup> *Bivens* actions are used to sue federal officials for violating your constitutional rights.

To make a constitutional challenge to the conditions of your confinement, you must first meet the qualifications of the Prison Litigation Reform Act (PLRA).<sup>89</sup> Under the PLRA, before you may challenge a condition of your confinement in court, you must first exhaust all available administrative remedies by using up whatever inmate grievance or appeals procedures you have in your prison.<sup>90</sup>

If you already brought three federal civil action claims or appeals to judgment on civil action claims that were dismissed as frivolous, malicious, or for failure to state a claim for which relief may be granted, any more civil action claims or appeals to judgments on civil action claims that you make *in forma pauperis*<sup>91</sup> will be dismissed unless you show “imminent danger or serious physical injury.”<sup>92</sup> Because of this provision, you want to make *in forma pauperis* claims cautiously. Second, if you are filing a writ of habeas corpus, you may have to exhaust all available administrative remedies before making your claim in a federal court.<sup>93</sup>

You may use 42 U.S.C. § 1983 to sue state or local officials for violating your constitutional rights.<sup>94</sup> Section 1983 is a way to address Fourth and Eighth Amendment claims. These claims involve your right to be free from illegal body searches.<sup>95</sup> The local or state government can only be held liable (responsible) under § 1983 if you show that your injury from the illegal body search was a direct result of the local or state government’s official policy or directive.<sup>96</sup>

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<sup>86</sup> 42 U.S.C. § 1983 (2012).

<sup>87</sup> See, e.g., *Williams v. Kaufman County*, 352 F.3d 994, 1013–1014 (5th Cir. 2003) (holding that the municipality could be held liable for unlawful searches of detainees because the policy was authorized by the sheriff, the relevant policymaker).

<sup>88</sup> Prisoners can make constitutional claims against federal officials in federal court under 28 U.S.C. § 1331 (2012) by using *Bivens* actions.

<sup>89</sup> 42 U.S.C. § 1997e (2012).

<sup>90</sup> 42 U.S.C. § 1997e(a) (2012).

<sup>91</sup> *In forma pauperis*, meaning “as a poor person,” means that you may file your claims without having to pay many normal court costs and fees or pay on an installment plan.

<sup>92</sup> 28 U.S.C. § 1915(g) (2012). See also, *Banos v. O’Guin*, 144 F.3d 883, 885 (5th Cir. 1998) (rejecting § 1983 complaint regarding the use of a body cavity searches to sexually harass the plaintiff and excessive force in conducting body cavity searches because the plaintiff failed to claim imminent danger of serious physical harm in accordance with § 1915(g)); *King v. Steven*, 382 Fed. App’x. 396 (5th Cir. 2010) (finding “imminent danger of serious physical injury”).

<sup>93</sup> 42 U.S.C. § 1997e(a) (2012); *Hardwick v. Ault*, 517 F.2d 295, 297 (5th Cir. 1975) (“If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release the traditional purpose of habeas corpus. In the case of a damage claim, habeas corpus is not an appropriate or available federal remedy.”) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 477, 93 S. Ct. 1827, 1830, 36 L. Ed. 2d 439, 443 (1973)) (holding that if “habeas corpus is the exclusive federal remedy in these circumstances, then a plaintiff cannot seek the intervention of a federal court until he has first sought and been denied relief in the state courts, if a state remedy is available and adequate”).

<sup>94</sup> See, e.g., *Florence v. Bd. Of Chosen Freeholders*, 566, U.S. 318, 339–340 132 S. Ct. 1510, 1523, 182 L. Ed. 2d 566, 583 (2012) (dismissing plaintiffs’ § 1983 claim against corrections officers alleging that strip searching non-indictable defendants is a violation of the Fourth and Eighth Amendments).

<sup>95</sup> See *Geiger v. Jowers*, 404 F.3d 371, 375 (5th Cir. 2005) (stating § 1997(e) “applies to all federal civil actions in which a prisoner alleges a constitutional violation”); *Hutchins v. McDaniels*, 512 F.3d 193, 196 (5th Cir. 2007) (holding that a claim that strip searches and cavity searches conducted within view of other prisoners and female body guards without the justification that the prisoner was suspected of possessing contraband is a potential unreasonable search in violation of the Fourth Amendment under § 1983).

<sup>96</sup> See *Grabowski v. Jackson County Pub. Defenders Office*, 47 F.3d 1386, 1392 (5th Cir. 1995) (stating that to obtain relief under § 1983, a prisoner must prove two elements: (1) a deprivation of a right secured by the Constitution and laws of the United States, and (2) a deprivation of that right by the defendant acting under color of state law).



When deciding a § 1983 claim, a court may find that the official's discretionary conduct (actions that involve judgement or choice) is immune from liability.<sup>97</sup> If an official is immune from liability, that means that he is protected from being sued by you even if he may have done something wrong. As long as the court determines that a reasonable officer would have thought the actions at issue to be lawful, the court will likely find the government officer immune from liability.<sup>98</sup> When making your § 1983 claim, you must show facts negating (disprove) this immunity in addition to facts establishing the violation.<sup>99</sup> For more information about immunity, see Chapter 8 of the *Louisiana State Supplement* and Chapter 16 of the main *JLM*.

You *must* show a physical injury in order get compensatory damages (money intended to pay you for your injury) for mental or emotional injuries.<sup>100</sup> However, such a showing of physical injury is not required to receive punitive (money intended to punish a person for wrongdoing) and nominal damages (damages that acknowledge a legal wrong but find no loss of money) or declaratory (determining the rights of the parties) or injunctive (preventing certain actions) relief.<sup>101</sup>

## F. CONCLUSION

You have limited constitutional rights when it comes to the privacy of your body from involuntary exposure and body searches. However, prison officials can still violate your rights under the Fourth Amendment, Eighth Amendment, and the Louisiana Constitution. Whether your rights have been violated will depend on how reasonable the explanation for the search was, the type of search or exposure, and its intrusion on your privacy. When making your claim for an illegal body search, look for cases with as many facts similar to your own claim as possible. Be as specific and detailed as you can when explaining the illegal body search. The more cases you can find with facts similar to your own situation, the better your chances are of showing that your rights were violated.

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<sup>97</sup> See *Mouille v. City of Live Oak*, 918 F.2d 548, 551 (5th Cir. 1990) ("When a defendant raises the defense of qualified immunity, however, we must determine whether the defendant's conduct was qualifiedly immune before reaching the merits of the section 1983 claim."); *Green v. McKaskle*, 788 F.2d 1116, 1124 (5th Cir. 1986) (finding that a prison official is entitled to qualified immunity); *Richardson v. McKnight*, 521 U.S. 399, 412 (1997) (holding that qualified immunity does not extend to privately employed prison guards hired by for-profit entities in § 1983 suits).

<sup>98</sup> See *Anderson v. Creighton*, 483 U.S. 635, 638–639, 107 S. Ct. 3034, 3038, 97 L. Ed. 2d 523, 529–530 (1987) (holding that whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action); *Johnson v. Johnson*, 385 F.3d 503, 524 (5th Cir. 2004) (applying *Anderson*, stating "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.").

<sup>99</sup> See *Brown v. Texas A & M University*, 804 F.2d 327, 333 (5th Cir. 1986) (holding that once the defendant (the prison official) claims qualified immunity, the burden shifts to the prisoner to establish that the defendant's conduct "violated clearly established statutory or constitutional rights of which a reasonable person would have known").

<sup>100</sup> 42 U.S.C. § 1997e(e) (2012) ("No federal civil action may be brought by a prisoner . . . for mental or emotional injury . . . without a prior showing of physical injury."). See, e.g., *Hutchins v. McDaniels*, 512 F.3d 193, 198 (5th Cir. 2007) (stating that while the plaintiff may seek relief for searches and cavity searches conducted within view of other prisoners and female body guards without the justification that the prisoner was suspected of possessing contraband in violation of the Fourth Amendment, the prisoner cannot claim compensatory damages because he did not suffer physical injury); *Samford v. Staples*, 249 Fed. App'x. 1001, 1004–1005 (5th Cir. 2007) (denying the plaintiff's claim of a violation of his constitutional rights arising from a retaliatory order to strip in a public hallway, among other claims, because he failed to show facts establishing the retaliation and stating the plaintiff would not have been able to recover compensatory damages under § 1997e because he did not claim any physical injury).

<sup>101</sup> See, e.g., *Geiger v. Jowers*, 404 F.3d 371, 375 (5th Cir. 2005) ("[The] physical injury requirement does not bar declaratory or injunctive relief for violations of a prisoner's Constitutional rights."); *Hutchins v. McDaniels*, 512 F.3d 193, 197 (5th Cir. 2007) (stating that although the plaintiff cannot seek compensatory damages for searches and cavity searches conducted within view of other prisoners and female body guards without the justification that the prisoner was suspected of possessing contraband in violation of the Fourth Amendment because he did not suffer physical injury, he may seek punitive or nominal damages under § 1983); *Whitman v. Washington*, 113 F. App'x. 605, 606 (5th Cir. 2004) (noting that, although prisoner could not recover actual damages, he might still be able to recover nominal damages for an Eighth Amendment claim).



## CHAPTER 25: RIGHTS OF JUVENILES\*

### A. INTRODUCTION

This Chapter has helpful information for you if you are under the age of 21. If you are not sure what any word or phrase means in this Chapter, you can look at the Glossary of Legal Terms in Appendix A.

First, this Chapter will tell you what to do if you think the government did not follow the right legal procedures (rules) in your case. There are some steps you can take to make sure that the outcome of your case is fair, both before and after it happens. This includes appealing your conviction. An “appeal” means you get to tell another court what you think the police, the prosecutor, your lawyer, or the judge did wrong. If your appeal succeeds, you might get a new trial, get out of detention, or have your sentence changed.

Second, this Chapter will tell you about the rights you have while you are incarcerated. When the government detains you, it has to follow certain rules to make sure that your rights are protected. If these rules are not being followed, there are several things you can do. First, you can file what is called a request for administrative review procedure (“ARP”). An ARP will explain your problem to those in charge of your facility and try to get help. Second, you can turn to the Project Zero Tolerance (“PZT”) system for help if you are facing violence or abuse. Third, you can ask the court to modify your disposition. Finally, you can file a special complaint against some state officials called a Section 1983 claim.<sup>1</sup> If you convince a court that you are not being treated properly, the court may issue an “injunction.” An injunction is an order that will force your caretakers to treat you better.

Chapter 38 of the main *Jailhouse Lawyer’s Manual (JLM)*, “Rights of Juveniles in Prison,” explains the rules that the government must follow if it accuses you of committing a federal crime. This Chapter explains the rules that the government must follow if it accuses you of breaking a Louisiana State law.

### B. WHAT ARE THE DIFFERENCES BETWEEN THE ADULT CRIMINAL SYSTEM AND THE JUVENILE DELINQUENCY SYSTEM IN LOUISIANA?

It is important to understand the differences between the adult Criminal System and the Juvenile Delinquency System. This is because you may be tried as an adult even if you are under the age of 17. If you were tried as an adult incorrectly, you may be receiving treatment that is not appropriate for you.

First, the purpose of the Criminal System is punitive. This means it focuses on punishing people for breaking the law. People are put in prison as punishment for their actions and to protect the community. However, the purpose of the Delinquency System in Louisiana is rehabilitative. This means that it focuses on teaching juvenile offenders to follow the law and improve their lives.<sup>2</sup>

Second, the Criminal System focuses on the crime, not the offender. For example, in adult criminal cases, the main question is whether you committed the crime. Even though you can try to explain your behavior, if a jury finds that you committed the crime, you will probably be punished. But the Delinquency System focuses more on the offender. The court is interested in three things: whether you

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\* This Supplement Chapter was written by Rebecca Azhdam, based in part on Chapter 38 of the main *JLM*, “Rights of Juveniles in Prison,” written by Kristin Lieske.

<sup>1</sup> For a detailed description of a § 1983 claim, see Chapter 16 of the main *JLM*: “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law.”

<sup>2</sup> See *State ex rel. S.D.*, 2002-0672, p. 25 (La. App. 4 Cir. 11/21/02); 832 So. 2d 415, 433 (observing that “the purpose of incarcerating juveniles . . . is treatment and rehabilitation, due process requires that the conditions and programs . . . must be reasonably related to that purpose”).

committed the crime, why you committed the crime, and what can be done to prevent you from committing a crime in the future.<sup>3</sup>

Third, juveniles in Louisiana have slightly different constitutional rights than adults in that they do not get a jury trial.<sup>4</sup> However, apart from jury trials, the Constitution of the United States and the Constitution of Louisiana give juveniles in juvenile proceedings the same rights that adults get in criminal trials.<sup>5</sup> Juvenile proceedings are appearances in court in which you, the judge, and lawyers are all present.

Fourth, in the adult Criminal System, all proceedings are open to the public unless the judge orders that they are closed for some special reason. This includes the trial and events before the trial. However, in Louisiana's Delinquency System, proceedings are closed to the public unless the case involves a crime of violence,<sup>6</sup> a second felony-grade delinquent act,<sup>7</sup> or certain other categories of crimes.<sup>8</sup>

Fifth, when you are found guilty as an adult in the Criminal System, you are given a "sentence." The sentence is based on your crime and criminal record. This is different from the Delinquency System. When you are found guilty as a juvenile in the Delinquency System, you are given a "disposition" instead of a sentence. A disposition is the time you must serve at a facility or in a program for the crime. A disposition is based on many things. These things include the reasons you committed the crime, how serious the crime was, and whether you have committed crimes before. Dispositions are "indeterminate." That means that the exact amount of time you have to serve may not be decided all at once. Instead, the disposition depends on how long the court thinks you need to fix your behavior. In Louisiana, the court can decrease the amount of time you must serve if the judge thinks you have been rehabilitated early, but cannot increase it.<sup>9</sup>

Lastly, juveniles in Louisiana are not always sent to detention facilities. There are programs often run by juvenile courts called "diversion programs" or "alternatives to detention" where juveniles may be sent. You will learn more about these later in this Chapter.

### C. WHY ARE JUVENILES TREATED DIFFERENTLY THAN ADULTS?

Laws treat juveniles differently from adults for a few reasons. First, people think that because juveniles are not as mature as adults, juveniles do not know why their actions were wrong the same way adults can. Also, juveniles may be more influenced by peer pressure. Second, people think juveniles are less dangerous to the public than adults. Third, people think it is easier to teach juveniles to follow the law in the future. Finally, the government thinks that juveniles can be taught why the crimes they committed are wrong. The goals of the juvenile justice system are to hold you responsible for your actions and provide you with treatment and education.<sup>10</sup>

<sup>3</sup> State *ex rel.* S.D., 14-439, p. 5 n.3 (La. App. 3 Cir. 10/1/14); 149 So. 3d 917, 921 n.3.

<sup>4</sup> See State *ex rel.* D.J., 2001-2149, p. 1 (La. 5/14/02); 817 So. 2d 26, 27.

<sup>5</sup> LA. CHILD. CODE ANN. art. 808 (2017).

<sup>6</sup> See LA. STAT. ANN. § 14:2(b) (2017) for a full description of which crimes count as "crimes of violence."

<sup>7</sup> See LA. CHILD. CODE ANN. art. 879(b)(1) (2017). A felony-grade delinquent act is an act that would be a felony if it were committed by an adult.

<sup>8</sup> LA. CHILD. CODE ANN. art. 879(b)(2) (2017) states that in juvenile delinquency proceedings involving first-degree murder, second-degree murder, aggravated or first-degree rape, aggravated kidnapping, armed robbery, negligent homicide, or vehicular homicide, the court must allow the victim, the victim's spouse, children, siblings, parents, grandparents, guardians, and legal custodians to be present in the courtroom at the adjudication hearing.

<sup>9</sup> See State *ex rel.* D.R., 2010-0406, p. 5 (La. App. 4 Cir. 10/20/10); 51 So. 3d 121, 124.

("Due . . . to the distinctive characteristics of juvenile proceedings, we do not agree that an indeterminate period of commitment *per se* renders the disposition illegal, as long as the court specifies a maximum."); State *ex rel.* S.D., 01-670, p. 12 (La. App. 5 Cir. 1/29/02); 807 So. 2d 1138, 1146 ("[T]he disposition must specify the maximum length of the term of commitment.").

<sup>10</sup> See *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (discussing general differences between juvenile and adult offenders, that, when taken together, demonstrate that juvenile offenders cannot reliably be classified as among the worst offenders); see also *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (holding that the differences between juvenile and adult offenders indicate that less culpability should attach to a crime committed by a juvenile than to a

## 1. Who is Considered a Juvenile in Louisiana?

Currently in Louisiana, juvenile courts have “original jurisdiction” over any child (which is anyone currently under the age of 18)<sup>11</sup> who has been accused of committing a delinquent act.<sup>12</sup> Original jurisdiction means that a court has the power to be the first to hear your case. If you were accused of committing a delinquent act before the age of 18, then you will be tried as a juvenile unless it was a certain type of crime.

### a. Can You be Tried as an Adult?

Even if you are under the age of 18, you may<sup>13</sup> be tried as an adult if you fit into either of the two categories:

- 1) *Charged as an adult*: You are formally charged (or “indicted”) with committing any of the following crimes, and you were fifteen years old or older<sup>14</sup> when the crime occurred<sup>15</sup>:
  - a. First degree murder
  - b. Second degree murder
  - c. Aggravated or first degree rape
  - d. Aggravated kidnapping
  - e. Attempted first degree murder
  - f. Attempted second degree murder
  - g. Manslaughter
  - h. Armed robbery
  - i. Aggravated burglary
  - j. Forcible or second degree rape
  - k. Simple or third degree rape
  - l. Second degree kidnapping
  - m. Aggravated battery committed with a firearm
  - n. A second aggravated battery
  - o. A second aggravated burglary
  - p. A second burglary of an inhabited dwelling
  - q. A second felony-grade violation of Part X or X-B of Chapter 4 of Title 40 of the Louisiana Revised Statutes of 1950<sup>16</sup> involving the manufacture, distribution, or possession with intent to distribute controlled dangerous substances.
- 2) *Sent to Continued Custody Hearing*: You are not formally charged with any of the offenses listed above, but the juvenile court holds what is called a “continued custody hearing,” (explained in detail later in this Chapter), and finds “probable cause” that you did one of the things listed above. Probable cause means that a reasonable person could look at the evidence and circumstances in your case and decide that you committed the crime you are accused of.

If you are indicted (formally charged) with any of the above crimes, or the court holds a continued custody hearing and decides that there is probable cause that you committed any of those crimes, then your case may be sent from juvenile court to criminal court. Then you may be tried as an adult. If this

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comparable crime committed by an adult).

<sup>11</sup> LA. CHILD. CODE ANN. art. 116(3) (2017).

<sup>12</sup> LA. CHILD. CODE ANN. art. 305(A) (2017). A delinquent act is an act committed by a juvenile for which an adult could be prosecuted in a criminal court. Delinquent acts include crimes against persons, crimes against property, drug offenses, and crimes against public order, when juveniles commit such acts.

<sup>13</sup> LA. CHILD. CODE ANN. art. 305(B)(1)(a), (b) (2017). For crimes (a) through (c) listed in subsection (2), your case will automatically be moved to adult criminal court. For all the other crimes listed, the prosecutor or judge can decide whether or not to move your case to adult criminal court.

<sup>14</sup> LA. CHILD. CODE ANN. art. 305(B) (2017). There are also limited circumstances where you can be tried as an adult if you committed a crime when you were fourteen years old.

<sup>15</sup> LA. CHILD. CODE ANN. art 305(B)(2) (2017).

<sup>16</sup> This part of the law prohibits selling, lending, renting, leasing, giving, exchanging, exhibiting, displaying, or distributing drug paraphernalia to any unmarried person under the age of seventeen.

happens, then the criminal court will stay in control of your case even if you later plead guilty to a “lesser included offense.” A lesser included offense is a crime that is part of a more serious crime.<sup>17</sup> The process of transfer will be discussed in more detail later in this Chapter.

## D. YOUR RIGHTS THROUGHOUT THE LEGAL PROCESS<sup>18</sup>

In order to detain you, the government has to obey certain rules to make sure that your rights are protected. If you are a juvenile and the government did not follow one of the rules below in your case, there are several steps you can take before and after your conviction, including filing an appeal. If your appeal succeeds, you may have your conviction vacated (reversed). Read the rules below and think about whether the government followed them in your case. If you think the government broke any of the rules below, you should tell your lawyer.

### 1. Due Process Rights

As mentioned above, juveniles in Louisiana have many of the same constitutional rights as adults. This includes several important “due process” rights. Due process rights are rights that the government must respect when taking away your freedom. In Louisiana, juveniles’ due process rights include: the right to plead not guilty by reason of insanity, the right to a hearing to determine mental capacity,<sup>19</sup> the right to bail before adjudication,<sup>20</sup> and the right to a public trial.<sup>21</sup> In Louisiana, the only due process right that adults have and juveniles do not have is the right to a jury trial.<sup>22</sup>

### 2. Right to Notice of Charges

According to the United States Constitution, juvenile defendants have a right to notice of charges. That means that they have a right to be told what they are being accused of. In order to fulfill this right, the government must notify you far enough in advance that you can prepare for court, and they must include a description of what you did wrong.<sup>23</sup> The Louisiana Constitution also says that defendants have the right to be told the reason for the accusations against them.<sup>24</sup> The Louisiana Children’s Code adds that the court must tell you what you are being accused of and why at your first appearance in court or at your appearance to answer the petition.<sup>25</sup> Both of those appearances are discussed more later in this Chapter.

### 3. Right to an Attorney

The Fifth and Sixth Amendments to the United States Constitution say that criminal defendants have the right to an attorney at all “critical stages of the proceeding.” Those are the stages of the proceedings that are most important.<sup>26</sup>

Louisiana state law gives juvenile defendants even more rights. Louisiana law says that juveniles must have access to an attorney at every stage of proceedings, not just critical stages.<sup>27</sup> This includes interrogation (when you are being questioned by the police), pre-adjudication, adjudication, disposition, post-disposition, and appeal. All of these stages are described in more detail in Part E, “Legal Process,” of

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<sup>17</sup> LA. CHILD. CODE ANN. art. 305(D) (2017).

<sup>18</sup> LA. CHILD. CODE ANN. art. 808 (2017). These rights apply to juveniles under juvenile court jurisdiction in Louisiana.

<sup>19</sup> See *In re C.B.*, 97-2783, p. 12 (La. 03/11/98); 708 So. 2d 391, 398.

<sup>20</sup> See *In re C.B.*, 97-2783, pp. 12–13 (La. 03/11/98); 708 So. 2d 391, 398.

<sup>21</sup> See *In re C.B.*, 97-2783, p. 13 (La. 03/11/98); 708 So. 2d 391, 398.

<sup>22</sup> See *State ex rel. D.J.*, 2001-2149, p. 1 (La. 05/14/02); 817 So. 2d 26, 27.

<sup>23</sup> See *In Re Gault*, 387 U.S. 1, 33 (1967).

<sup>24</sup> LA. CONST. art. I, § 13.

<sup>25</sup> LA. CHILD. CODE ANN. art. 855 (2017) (requiring the court to advise juveniles of the nature of the delinquency proceeding, the nature of the allegations in the petition, their right to an adjudication hearing, their right to be represented by an attorney, their privilege against self-incrimination, the range of answers available to them, like admission; denial; denial by reason of insanity; and nolo contendere, and the possible consequences of their admission).

<sup>26</sup> *United States v. Wade*, 388 U.S. 218, 224 (1967).

<sup>27</sup> LA. CHILD. CODE ANN. art. 809(A) (2017).

this Chapter. Under Louisiana state law, if the court finds that your parents cannot afford to hire an attorney for you, the court must assign one to represent you.<sup>28</sup> You may choose to give up your right to an attorney under certain circumstances. This is called a waiver.

a. Waiving Your Right to an Attorney

You may waive (give up) your right to an attorney during an interrogation, but this waiver must be “knowing and voluntary.” That means that it must be your choice and you must understand what you are doing. If you waived your right to an attorney because you were forced or pressured to do so, or because you did not know what was happening, it is possible that your confession should have been “suppressed.” Suppressed means not used against you at trial. In order to figure out whether your waiver (choice to not speak to an attorney during interrogation) was knowing and voluntary, the court may look at several different factors. These factors include your:<sup>29</sup>

- 1) Age
- 2) Experience
- 3) Education
- 4) Background
- 5) Intelligence
- 6) Environment during interrogation
- 7) Presence of an adult who is interested in your well-being
- 8) Ability to understand the warnings given to you
- 9) Ability to understand the consequences of waiving your rights.

For example, in one case, the court found that an 11-year-old juvenile's waiver of his rights was not knowing and voluntary. This is because he did not have an adult with him to explain his rights and detectives cursed at him and intimidated him.<sup>30</sup> In another case, the court found that a mentally retarded defendant's waiver of *Miranda*<sup>31</sup> rights was not knowing and voluntary, even though the detective testified that he believed that the defendant understood his rights.<sup>32</sup> If you feel that your waiver was not knowing and voluntary, then you may be able to appeal your conviction. You may also be able to file a petition asking the court to set aside your adjudication or disposition.

You may knowingly and voluntarily waive your right to an attorney during the later stages of your case, including pre-adjudication, adjudication, and disposition, if:

- 1) You have talked to an attorney or with another adult interested in your well-being (called an “adult advisor”) about your decision;
- 2) The court has explained to both you and your adult advisor the possible consequences of giving up your right to an attorney;
- 3) You are mentally able to waive your rights and your waiver is voluntary (you were not pressured or forced to give up your rights);<sup>33</sup>
- 4) Your waiver is in writing, describing why you meet the three requirements above, and your waiver is signed by both you and your attorney or adult advisor.<sup>34</sup>

Even if you meet these conditions, there are a few situations where the court cannot allow you to waive your right to an attorney:

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<sup>28</sup> LA. CHILD. CODE ANN. art. 809(B) (2017).

<sup>29</sup> State v. Fernandez, 96-2719, p. 5 (La. 04/14/98); 712 So. 2d 485, 487.

<sup>30</sup> See State ex rel. J.E.T., 09-67, pp. 24–25 (La. App. 3 Cir. 05/06/09); 10 So. 3d 1264, 1278–1279.

<sup>31</sup> Miranda v. Arizona, 384 U.S. 436 (1966) is the United States Supreme Court case that determined that the police are required to inform any detained persons of their constitutional rights, including the right against self-incrimination and the right to speak to a lawyer.

<sup>32</sup> See State v. Raiford, 2003-0098, pp. 26–27 (La. App. 4 Cir. 04/23/03); 846 So. 2d 913, 928.

<sup>33</sup> LA. CHILD. CODE ANN. art. 810(A) (2017).

<sup>34</sup> LA. CHILD. CODE ANN. art. 810(B) (2017).

- 1) It has been recommended to the court that you be placed in a mental hospital, psychiatric unit, or substance abuse facility;
- 2) You are charged with a felony-grade delinquent act (which is an act that would be a felony if committed by an adult);
- 3) You are appearing in a probation or parole revocation hearing;<sup>35</sup> or
- 4) An attorney is needed “in the interests of justice”<sup>36</sup> (to make sure the outcome of your case is fair).

b. Your Attorney’s Responsibilities

Your attorney has important responsibilities while representing you. It is important for you to know what these responsibilities are. First, it will let you know what to expect from your relationship with your attorney. Second, you may be able to appeal your conviction based on “ineffective assistance of counsel.”<sup>37</sup> You can claim ineffective assistance of counsel if your attorney did not uphold his responsibilities *and* your case probably would have turned out differently if it was not for his unprofessional behavior.<sup>38</sup> The courts give attorneys the benefit of the doubt when they are accused of not having done their job properly.<sup>39</sup> This means that ineffective assistance of counsel is usually a very hard thing to prove. For more information, *see* Chapter 12 of the main *JLM*, “Appealing Your Conviction Based on Ineffective Assistance of Counsel” and Chapter 3 of the *Louisiana State Supplement*, “Appealing Your Conviction Based on Ineffective Assistance of Counsel.”

While handling your case, your attorney must provide “competent representation.” This means that your attorney must have the legal knowledge and skill that is needed to represent you. Your attorney must prepare his work carefully throughout your case.<sup>40</sup> Your attorney must tell you who he is and what he does.<sup>41</sup> He must give you enough information to make a good decision about how to move forward with your case.<sup>42</sup> Your attorney must help you understand, as much as possible, what your options are. He must explain what the consequences of your choices might be.<sup>43</sup> Your attorney must also keep you up-to-date on the status of your case.<sup>44</sup> One of your attorney’s most important responsibilities is his going along with your decisions as to the goals of your representation, although he is free to make his own decisions about how to accomplish these goals.<sup>45</sup> However, he cannot go along with your decisions if they are illegal, unethical, or outside the scope of what your attorney is allowed to do. Your attorney must also go along with your decisions about what plea you will enter and whether you will testify.<sup>46</sup> Finally, your lawyer can only reveal information that is necessary to protect your interests. They may not act against your interests, even if it is personally or professionally convenient for him to do so.<sup>47</sup>

## E. STAGES OF THE LEGAL PROCESS

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<sup>35</sup> LA. CHILD. CODE ANN. art. 810(D) (2017).

<sup>36</sup> LA. CHILD. CODE ANN. art. 810(C) (2017).

<sup>37</sup> *See* State v. Eiskina, 42,492, p. 3 (La. App. 2 Cir. 9/19/07), 965 So. 2d 1010, 1013 (“Claims of ineffective assistance of counsel are more properly raised in an application for post-conviction relief in the trial court because it provides the opportunity for a full evidentiary hearing . . . . When the record is sufficient, however, allegations of ineffective assistance of trial counsel may be resolved on direct appeal in the interest of judicial economy.”).

<sup>38</sup> *See* Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Wright, 598 So. 2d 493, 497 (La. App. 2 Cir. 1992).

<sup>39</sup> State v. Myers, 583 So.2d 67, 71 (La. App. 2 Cir. 1991) (“There is a strong presumption that the conduct of counsel falls within the wide range of responsible professional assistance.”).

<sup>40</sup> Louisiana Rules of Professional Conduct, Rule 1.1; *see* State *ex rel.* D.L., 11-835 (La. App. 5 Cir. 5/22/2012); 96 So. 3d 580 (holding that an attorney’s failure to file a motion to dismiss the delinquency petition based on the court’s failure to hold juvenile’s adjudication hearing within 30 days of the appearance constituted deficient performance); State v. Kamau, 47,328, pp. 4–5 (La. App. 2 Cir. 7/26/12); 131 So. 3d 871, 874–875 (holding that an attorney’s failure to raise numerous valid objections constituted deficient performance).

<sup>41</sup> Louisiana Rules of Professional Conduct, Rule 1.4(a)(5), (b).

<sup>42</sup> Louisiana Rules of Professional Conduct, Rule 1.4(a)(1).

<sup>43</sup> Louisiana Rules of Professional Conduct, Rule 1.0(e), 1.4(a)(2)

<sup>44</sup> Louisiana Rules of Professional Conduct, Rule 1.4(a)(3)

<sup>45</sup> Louisiana Rules of Professional Conduct, Rule 1.2(a).

<sup>46</sup> Louisiana Rules of Professional Conduct, Rule 1.2(a).

<sup>47</sup> Louisiana Rules of Professional Conduct, Rule 1.6.



This Section will explain what your rights are and what is supposed to happen at each stage of your case. As you read this Section, think about whether the government followed the rules in your case. If you think the government broke any of the rules below, you should tell your lawyer. If you are in detention waiting for your trial to begin, look closely at these Sections on arrest and custody, transfer, diversion, and competency. If your trial has already started, read the Sections on motions to vacate adjudication and deferred dispositional agreement. If your trial is over, pay close attention to the Sections on modification of disposition, appeals, and post-conviction relief.

### 1. Arrest and Custody

In order for an arrest to be legal, the police must have probable cause to think that you committed a crime or violated your parole.<sup>48</sup> Remember, probable cause means that a reasonable person could look at what happened in your case and decide that you committed the crime you are accused of. If the police take you into custody without a court order or warrant, they must either:

- 1) Explain what is happening and release you to your parents; or
- 2) Take you to a juvenile detention center or shelter care facility right away.<sup>49</sup>

If you are released to your parents, the officer who arrested you must submit a report to the court. This report must explain why he had probable cause to arrest you. He must file the report within 7 days after you are released.<sup>50</sup> If you are taken to a juvenile detention center or shelter care facility, the following things must happen:

- 1) The police must notify your parents as soon as possible;<sup>51</sup>
- 2) The officer who arrested you must submit a report to the court explaining why he had probable cause to arrest you within 24 hours after you are taken into custody;<sup>52</sup>
- 3) The court must review this report within 48 hours after you are taken into custody<sup>53</sup> and decide whether there was probable cause to arrest you;
- 4) If the court decides that there was probable cause, it must schedule a continued custody hearing (explained below) within 3 days after you are placed in a facility;<sup>54</sup> and
- 5) If the court decides that there was not probable cause, then you must be released.<sup>55</sup>

It is important to realize that juveniles can be arrested for some things that adults cannot be arrested for. These acts are usually called “status offenses.” For example, in one case, a court decided that officers could arrest a juvenile who had run away from home, even though running away from home would not be considered a crime for an adult.<sup>56</sup>

### 2. Continued Custody Hearing

If you continue to be held in a juvenile detention facility or shelter care facility after the police take you into custody, you must be brought in front of a judge within 72 hours.<sup>57</sup> At this court appearance, called a continued custody hearing, the court will decide whether there was probable cause to take you into custody in the first place. The court will also decide whether there is a need to keep you in detention.

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<sup>48</sup> LA. CHILD. CODE ANN. art. 814(A) (2017).

<sup>49</sup> LA. CHILD. CODE ANN. art. 814(B)(1), (2) (2017).

<sup>50</sup> LA. CHILD. CODE ANN. art. 814(F) (2017).

<sup>51</sup> LA. CHILD. CODE ANN. art. 814(C) (2017).

<sup>52</sup> LA. CHILD. CODE ANN. art. 814(F) (2017).

<sup>53</sup> LA. CHILD. CODE ANN. art. 814(D) (2017).

<sup>54</sup> LA. CHILD. CODE ANN. art. 819 (2017).

<sup>55</sup> LA. CHILD. CODE ANN. art. 814(D) (2017).

<sup>56</sup> *See In re Moten*, 242 So. 2d 849, 853 (La. App. 4 Cir. 1970) (holding that entry into a house without a warrant to arrest the juvenile was justified by an exigent circumstance).

<sup>57</sup> LA. CHILD. CODE ANN. art. 819 (2017).

If the court decides to keep you in detention, it must set bail.<sup>58</sup> Bail means that you may be released temporarily until your trial, but sometimes you must pay some money to the court for this to happen.

You are allowed to have witnesses, testify on your own behalf, and cross-examine the state's witnesses at a continued custody hearing.<sup>59</sup> Hearsay evidence (what a witness says that someone else said) is allowed at a continued custody hearing.<sup>60</sup>

Information about poor conditions, problems, or lack of resources and services at your juvenile detention center is important. It may allow your attorney to argue that the facility is not appropriate for you. Tell your attorney if you experience any of these things while in detention.

### 3. Pre-adjudication

Pre-adjudication is the stage of your case before the judge looks at evidence and arguments. There are some points during pre-adjudication when the court may decide that your case should not move forward towards adjudication. If you are in detention waiting for your trial to begin, pay close attention to what your options are. Also, pay close attention to what your attorney can do to help you.

If you are evaluated and found to have a disability, the court needs to know. Some studies say that as many as seventy percent of incarcerated youth have a disability.<sup>61</sup> Some disabilities are invisible, unlike the need for a wheelchair or cane. For example, learning or emotional disabilities often lead to problems with other people. Proper evaluation and treatment of these problems can make rehabilitation easier. It can also make education and other programs more helpful.

If you have already been diagnosed with a disability but your previous Individualized Education Program ("IEP") was not followed while you attended school, you should tell your lawyer. For instance, if you were diagnosed with a learning disability, your IEP may have required you to have a tutor to help you with your studies. But if your school never gave you a tutor, their failure to follow the IEP could help you explain to the judge why you may have had trouble with rehabilitation programs before. If your lawyer can convince the judge that this is true, you may receive a lighter sentence.

### 4. Petition

Delinquency proceedings officially start when the government files a petition.<sup>62</sup> A petition is a document that says that you have committed a delinquent act. A copy of the petition and a "summons" (an order to appear before a judge) must be delivered to you and your parents.<sup>63</sup> If you are held in detention before your adjudication, then the petition must be filed within 48 hours after your continued custody hearing.<sup>64</sup> If it is not filed on time, then you must be released.<sup>65</sup>

### 5. Answer

In order to answer the claims the government makes against you in its petition, you must appear in court. If you have not had a continued custody hearing, this may be your first appearance in court. At the answer hearing, the court must decide whether you are able to understand what is going on. The court must tell you about your constitutional rights (including your right to an attorney). The court must also

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<sup>58</sup> LA. CONST. art. I, § 18; LA. CHILD. CODE ANN. art. 823 (2017).

<sup>59</sup> LA. CHILD. CODE ANN. art. 821(B) (2017).

<sup>60</sup> LA. CHILD. CODE ANN. art. 821(C) (2017).

<sup>61</sup> Dep't. of Justice, OJJDP Bull. No. NCJ 179359, Special Education and the Juvenile Justice System (2000), *available at* <http://www.ncjrs.gov/pdffiles1/ojjdp/179359.pdf> (last visited Jan. 25, 2018).

<sup>62</sup> LA. CHILD. CODE ANN. art. 842 (2017).

<sup>63</sup> LA. CHILD. CODE ANN. art. 847 (2017); LA. CHILD. CODE ANN. art. 850(A) (2017); *see also* *In re Banks*, 402 So. 2d 690, 695 (La. 1981) (ordering the trial court to grant bail to two young girls pending their delinquency adjudications).

<sup>64</sup> LA. CHILD. CODE ANN. art. 843(A) (2017).

<sup>65</sup> LA. CHILD. CODE ANN. art. 843(B) (2017).

tell you about the consequences of admitting anything at the hearing.<sup>66</sup> There are a few different ways you can answer the government's petition<sup>67</sup>:

- 1) Admit that the claims in the petition are true;
- 2) Deny that the claims in the petition are true;
- 3) Deny that the claims in the petition are true and plead insanity;
- 4) Enter a response of "nolo contendere" (meaning that you neither admit nor deny the claims in the petition) with the permission of the court. This is also called a "plea of no contest."

If you are in custody, the petition may be filed before your continued custody hearing. If that happens, the court may order you to answer the petition at the continued custody hearing.<sup>68</sup> If you are not ordered to answer the petition at the continued custody hearing, then you must appear in court to answer within 5 days after the petition is filed.<sup>69</sup>

If you are not in custody, then you must appear in court to answer the petition within 15 days after the petition is filed.<sup>70</sup> If you have a good reason, the court may give you extra time.<sup>71</sup>

## 6. Transfer to Adult Criminal Court

In certain situations, your case may be sent from the juvenile court to the adult criminal court for prosecution. It is important to understand how transfers work, and all of the different ways that your case can end up in adult criminal court. It is almost always better for your case to stay in juvenile court. This is because rehabilitation is not the purpose of the adult system.<sup>72</sup> That means that you may therefore face a worse sentence and have a much harder time re-entering society if you are convicted in the adult criminal court. Also, once you are transferred to adult criminal court, you cannot be transferred back to juvenile court. This is true even if at the end of your trial you are convicted of a lesser crime than the one you were charged with.<sup>73</sup>

The first way your case can end up in adult criminal court is called "legislative waiver." Legislative waiver is when the adult criminal court automatically has the power to hear your case for the first time (which is called "original jurisdiction"). This happens if you were 15 years or older when they think you committed one of the following crimes<sup>74</sup>:

- 1) First-degree murder
- 2) Second-degree murder
- 3) Aggravated rape
- 4) Aggravated kidnapping

If you are indicted (which means formally charged) with any of the above crimes, or the court has a continued custody hearing and decides that there is probable cause that you committed any of the above crimes, then your case will be transferred to adult criminal court automatically.<sup>75</sup> To try to stop this from happening, your attorney must argue at your continued custody hearing that there is no probable cause. If

<sup>66</sup> LA. CHILD. CODE ANN. art. 855 (2015); *see also* State *ex rel.* K.G., 34535, p. 20–21 (La. App. 2 Cir. 1/24/01); 778 So. 2d 716, 728 ("[T]he court shall then advise [the child] of the following items . . . (7) the possible consequences of his admission that the allegations are true, including the maximum and minimal dispositions which the court might impose.").

<sup>67</sup> LA. CHILD. CODE ANN. arts. 856(A)(1)–(4) (2017).

<sup>68</sup> LA. CHILD. CODE ANN. art. 854(A) (2017); *see* State v. B.J.D., 35409 (La. App. 2 Cir 9/26/01); 799 So. 2d 563.

<sup>69</sup> LA. CHILD. CODE ANN. art. 854(A) (2017).

<sup>70</sup> LA. CHILD. CODE ANN. art. 854(B) (2017).

<sup>71</sup> LA. CHILD. CODE ANN. art. 854(C) (2017).

<sup>72</sup> *See* In re C.B., 97-2783, p. 10 (La. 3/11/98); 708 So. 2d 391, 396–397 ("Thus, the unique nature of the juvenile system is manifested in its noncriminal, or 'civil,' nature, its focus on rehabilitation and individual treatment rather than retribution, and the state's role as *parens patriae* in managing the welfare of the juvenile in state custody.").

<sup>73</sup> LA. CHILD. CODE ANN. art. 863 (2017); State v. Hamilton, 96-0107, p. 4 (La. 7/2/96); 676 So. 2d 1081, 1083.

<sup>74</sup> LA. CHILD. CODE ANN. art. 305(A) (2017).

<sup>75</sup> LA. CHILD. CODE ANN. art. 305(A) (2017).

the court disagrees and transfers your case to adult criminal court, you may be moved from a juvenile facility to a facility where adults are kept before trial.<sup>76</sup> Afterwards, everything in your case will happen in adult criminal court. You will face the same punishments as adults do if you are found guilty.

The second way your case can end up in adult criminal court is “prosecutorial waiver.” This is also called “direct file.” Prosecutorial waiver means that if you were 15 years old or older when they think you committed one of the following crimes, the government prosecutor can decide whether or not to move your case to adult criminal court<sup>77</sup>:

- 1) Attempted first degree murder
- 2) Attempted second degree murder
- 3) Manslaughter
- 4) Armed robbery
- 5) Aggravated burglary
- 6) Forcible or second degree rape
- 7) Simple or third degree rape
- 8) Second degree kidnapping
- 9) Aggravated battery committed with a firearm
- 10) A second aggravated battery
- 11) A second aggravated burglary
- 12) A second burglary of an inhabited dwelling
- 13) A second felony-grade violation of Part X or X-B of Chapter 4 of Title 40 of the Louisiana Revised Statutes of 1950<sup>78</sup> involving the manufacture, distribution, or possession with intent to distribute controlled dangerous substances.

If you are in detention, the government prosecutor has 30 days from the date of your arrest to tell the juvenile court whether he plans to move your case to adult criminal court.<sup>79</sup> If the government prosecutor misses this deadline, then you may be released from detention.<sup>80</sup>

The third way your case can end up in adult criminal court is “judicial waiver by transfer hearing.”<sup>81</sup> This allows the juvenile court to decide whether to move your case to adult criminal court if you were 14 or older when they think you committed one of the following crimes<sup>82</sup>:

- 1) First-degree murder
- 2) Second-degree murder
- 3) Aggravated kidnapping
- 4) Aggravated rape
- 5) Aggravated battery that involves shooting a gun
- 6) Armed robbery that involves a gun
- 7) Forcible rape of a child at least two years younger than you

Judicial waiver by transfer can only happen after a transfer hearing in juvenile court. In that transfer hearing, the government must show by “clear and convincing” proof<sup>83</sup> that there is no way you

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<sup>76</sup> LA. CHILD. CODE ANN. art. 306(D) (2017).

<sup>77</sup> LA. CHILD. CODE ANN. art. 305(B) (2017).

<sup>78</sup> This part of the law prohibits selling, lending, renting, leasing, giving, exchanging, exhibiting, displaying, or distributing drug paraphernalia to any unmarried person under the age of seventeen.

<sup>79</sup> LA. CHILD. CODE ANN. art. 305(B)(3) (2017).

<sup>80</sup> See *State v. Hamilton*, 96-0107, p. 6 (La. 7/2/96); 676 So. 2d 1081, 1084 (holding that where the government prosecutor at first filed a petition in juvenile court charging the 15-year-old with armed robbery, then changed his mind over a month later, the youth should be released, although he would still be subject to further proceedings in criminal court).

<sup>81</sup> LA. CHILD. CODE ANN. art. 857(A) (2017).

<sup>82</sup> LA. CHILD. CODE ANN. art. 857(A) (2017).

<sup>83</sup> Clear and convincing proof is proof much more likely to be true than not, and that the trier of fact (judge) believes strongly is true.

can be rehabilitated in the juvenile system.<sup>84</sup> Before making a decision, the court must consider your age and maturity, the seriousness of the crime they think you committed, whether you have committed any past crimes, whether rehabilitation has worked for you in the past, whether you have physical or mental problems, and whether Louisiana's juvenile facilities have the resources needed to rehabilitate you.<sup>85</sup> There are several rules the government must follow at your transfer hearing<sup>86</sup>:

- 1) It must protect your right to due process and fair treatment (discussed in Section D(1) above);
- 2) You must be given access to an attorney;
- 3) Your attorney must be given access to records relevant to your case, including probation reports and other similar reports; and
- 4) The government must tell you why you are being transferred and include facts to support its decision, so that you can appeal it later if you need to.

If your case is transferred through this kind of waiver when you are 14 years old, you cannot be incarcerated beyond your 31st birthday.<sup>87</sup>

## 7. Diversion

"Diversion" is a process where you can be temporarily removed from the regular juvenile delinquency process if you promise to do certain things. For diversion to happen, you must have what is called an informal adjustment agreement ("IAA") with the prosecutor and the court. The IAA will say that you must do certain things. These things may include community service, or youth court/drug court programs.<sup>88</sup> The court may move forward with diversion if both you and the government prosecutor agree. If you do all the things you promised to do in the agreement, you will be released from the court's supervision. The court must also dismiss the petition against you "with prejudice" (which means the government cannot file it again).<sup>89</sup> But if you do not do all the things you promised to do, your case will pick up where it left off and the regular delinquency process will be followed.<sup>90</sup> An IAA can happen before or after a petition is filed,<sup>91</sup> but must happen before "jeopardy" begins (after "jeopardy," you can't be charged with the same crime for the same incident again).<sup>92</sup> The court cannot order a diversion that lasts for more than six months at first, but it can later extend the diversion for another six months.<sup>93</sup>

Entering into an IAA may be a good opportunity for you, because it can allow you to avoid a delinquency finding. A delinquency finding is a decision by the court that you committed a delinquent act. An IAA may also allow you to avoid probation or a juvenile detention facility. However, there are several things you should know before you enter into an IAA. First, if you did not actually commit a delinquent act, entering into an IAA will mean that you are giving up your chance to make the government prove its charges against you. If you are innocent, having to participate in certain programs may interrupt your life for no good reason. Second, if you do not think you can keep all the promises you are asked to make, it may not be a good idea to enter into an IAA. That is because the fact that you entered into an IAA and did not finish it may be used against you at the disposition stage of your trial, and could lead to a worse outcome for you.

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<sup>84</sup> LA. CHILD. CODE ANN. art. 862 (2017).

<sup>85</sup> LA. CHILD. CODE ANN. art. 862(A)(2) (2017).

<sup>86</sup> LA. CHILD. CODE ANN. art. 862 (2017); *State v. Everfield*, 342 So. 2d 648, 654 (La. 1977).

<sup>87</sup> LA. CHILD. CODE ANN. art. 857(B) (2017).

<sup>88</sup> LA. CHILD. CODE ANN. art. 841(B), (C) (2017) (declaring that incriminating statements you make during the agreement process cannot be used in a later adjudication hearing or criminal trial).

<sup>89</sup> LA. CHILD. CODE ANN. art. 841(B) (2017).

<sup>90</sup> LA. CHILD. CODE ANN. art. 841(B) (2017).

<sup>91</sup> LA. CHILD. CODE ANN. art. 839(B) (2017).

<sup>92</sup> LA. CHILD. CODE ANN. art. 839(B) (2017); LA. CHILD. CODE ANN. art. 811 (2017) ("When a child enters a denial to the petition, jeopardy begins when the first witness is sworn at the adjudication hearing. When he enters an admission to the petition, jeopardy begins when a valid disposition is made the judgment of the court.").

<sup>93</sup> LA. CHILD. CODE ANN. art. 840(C) (2017).

## 8. Mental Capacity to Proceed

The question of your mental capacity to continue with the trial (your ability to understand the process and be able to help your attorney at the adjudication hearing)<sup>94</sup> may be raised at your continued custody hearing, and at any stage of the case after the continued custody hearing. Once the question of your mental capacity is brought up, your case will be put on hold until the question is resolved.<sup>95</sup>

If after a mental examination and a hearing, the court decides that you do not have the mental capacity to continue with the trial, there are several steps the court may take:

- 1) Dismiss the petition against you;
- 2) Decide that your family needs to receive certain services in order to help you (called FINS, or Family in Need of Services) and move forward with a disposition under the FINS guidelines;<sup>96</sup> or
- 3) Place you under the supervision of the Department of Health and Hospitals or a private mental institution (if the court thinks you may be dangerous to yourself or others).<sup>97</sup>

## 9. Adjudication

The adjudication stage in a delinquency case is similar to a trial in criminal court. At an adjudication hearing, the juvenile court judge will look at all the evidence that the government prosecutor and your attorney showed him<sup>98</sup> and then decide whether or not you committed a delinquent act “beyond a reasonable doubt” (the judge has to be very certain you committed the act).<sup>99</sup>

If you are being held in custody, your adjudication hearing must start within 30 days of your appearance in court to answer the petition,<sup>100</sup> unless the court extends this time for a good reason.<sup>101</sup>

If you are not being held in custody, then your adjudication hearing must start within 90 days of your appearance in court to answer the petition,<sup>102</sup> unless the court extends this time for a good reason.<sup>103</sup>

After your adjudication hearing is over, the court must immediately tell you what its decision is.<sup>104</sup>

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<sup>94</sup> LA. CHILD. CODE ANN. art. 804(7) (2017).

<sup>95</sup> LA. CHILD. CODE ANN. art. 832 (2017).

<sup>96</sup> FINS disposition procedures are outlined in Title VII, Chapter 12 of the Louisiana Children’s Code. LA. CHILD. CODE ANN. art. 777 (2017).

<sup>97</sup> LA. CHILD. CODE ANN. art. 837(B) (2017).

<sup>98</sup> LA. CHILD. CODE ANN. art. 878, 884 (2017); *see In re T.E.*, 2000-1810, p. 6 (La. App. 4 Cir. 04/11/01); 787 So.2d 414, 418.

<sup>99</sup> LA. CHILD. CODE ANN. art. 883 (2017); *see In re D.J.*, 2001-2149, p. 6 (La. 05/14/02), 817 So. 2d 26, 30 (“[D]elinquency adjudications must rest on proof beyond a reasonable doubt”).

<sup>100</sup> LA. CHILD. CODE ANN. art. 877(A) (2017); *see In re J.B.*, 2003-0587, p. 2 (La. App. 4 Cir. 12/19/03); 863 So. 2d 669, 670 (“If the child is continued in custody . . . the adjudication hearing shall commence within thirty days of the appearance to answer the petition.”).

<sup>101</sup> LA. CHILD. CODE ANN. art. 877(D) (2017).

<sup>102</sup> LA. CHILD. CODE ANN. art. 877(B) (2017).

<sup>103</sup> LA. CHILD. CODE ANN. art. 877(D) (2017); *see In re R.D.C.*, 93-CK-1865 (La. 2/28/94); 632 So. 2d 745, 747 (Time limitations are mandatory and may only be extended for good cause. In making a determination of “good cause” the court must be mindful of causes beyond the control of the government prosecutor which may affect its ability to prepare for the hearing.).

<sup>104</sup> LA. CHILD. CODE ANN. art. 884(A) (2017); *see In re S.D.*, 01-670, p. 14 (La. App. 5 Cir. 01/29/02); 807 So. 2d 1138, 1148 (“Following the adjudication hearing, the court shall immediately declare whether the evidence warrants an adjudication that the child is delinquent. In exceptional circumstances, the court may take the matter under advisement.”).

## 10. Post-adjudication

If the court decides that you did commit a delinquent act, then you or your attorney may file a Motion to Vacate the Adjudication at any time before the disposition stage of your case begins.<sup>105</sup> Your delinquency adjudication must be vacated (reversed), and your case must be *dismissed* if the court thinks<sup>106</sup>:

- 1) The petition is flawed because it leaves out certain crucial information;
- 2) The delinquent act you were charged with committing does not actually violate any law;
- 3) The court that entered your adjudication didn't have the jurisdiction (authority) to do so;
- 4) The delinquent act you are being charged with constitutes "double jeopardy";<sup>107</sup> or
- 5) The government prosecutor did not meet the proper deadlines.

Your delinquency adjudication must be vacated (reversed) and *a new adjudication hearing* must be ordered if the court thinks<sup>108</sup>:

- 1) The adjudication does not answer the petition filed by the government, or it is otherwise flawed in important ways;
- 2) The adjudication was based on fraud or mistake;
- 3) New and "material" (affects how the case will come out) evidence is discovered;<sup>109</sup>
- 4) The adjudication goes against the law and the evidence;
- 5) The adjudication must be vacated to make sure there is a fair outcome in your case.<sup>110</sup>

## 11. Disposition

The disposition phase of your case is when the court decides what the consequences of your adjudication will be. This could include being sent to a juvenile detention facility.

### a. Deferred Dispositional Agreement

A deferred dispositional agreement ("DDA") is similar to a diversion/IAA in that it is a sort of detour from the normal delinquency process. The government prosecutor or your attorney can request a DDA at any point after your adjudication ends and before your disposition is decided. If you enter into a DDA, the court will temporarily pause your disposition hearing and place you on probation. Probation could include drug treatment, counseling, or other services that you need.<sup>111</sup> Both you and your parent or guardian must agree to a DDA.<sup>112</sup> A DDA can last for up to six months, although you may be released from it earlier<sup>113</sup> or later<sup>114</sup> by the court.

A DDA can be a very beneficial option for you. It allows you to receive the services you need while at the same time giving you the chance to have your delinquency adjudication set aside if you do what the agreement requires of you. You should consider entering into a DDA unless you know you will not be able

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<sup>105</sup> LA. CHILD. CODE ANN. art. 887(A) (2017).

<sup>106</sup> LA. CHILD. CODE ANN. art. 887(A) (2017).

<sup>107</sup> "Double jeopardy" means that you were tried on the same charges in the same case after you were already found innocent or guilty.

<sup>108</sup> LA. CHILD. CODE ANN. art. 887(B) (2017).

<sup>109</sup> Article 851(3) of the Code of Criminal Procedure provides that a new trial shall be granted whenever "[n]ew and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty." LA. CODE CRIM. PROC. ANN. art. 851(3) (2017).

<sup>110</sup> LA. CHILD. CODE ANN. art. 887(C) (2017).

<sup>111</sup> LA. CHILD. CODE ANN. art. 896(A) (2017).

<sup>112</sup> LA. CHILD. CODE ANN. art. 896(B) (2017).

<sup>113</sup> LA. CHILD. CODE ANN. art. 896(D) (2017).

<sup>114</sup> LA. CHILD. CODE ANN. art. 896(D) (2017) (The court may extend the agreement for another 6 months, or for whatever period in which the child is a full-time participant in a juvenile drug court program, whichever period is longer.).

to meet all of its conditions, because if you are being offered a DDA then you have already been found delinquent and will face more serious consequences if your case goes forward towards final disposition.

#### b. Disposition Hearing

At a disposition hearing, the government prosecutor and your attorney may present evidence and question witnesses in order to help the court decide whether you need treatment or rehabilitation.<sup>115</sup> The disposition hearing can happen right after the adjudication, but it must happen within 30 days of the adjudication.<sup>116</sup> If the court finds that you do need treatment or rehabilitation, it must immediately make a disposition. Whatever disposition the court makes must be authorized by the Louisiana Children's Code.<sup>117</sup> The court should give you the least restrictive (least limits on your freedom) disposition possible according to the Children's Code and the circumstances of your case.<sup>118</sup>

### 12. Post-disposition

Unlike criminal court, a juvenile court has an ongoing responsibility to keep track of and protect the young people it is in charge of even after a disposition order.<sup>119</sup>

After the disposition in your case is entered, the court still has to power to change it at any time.<sup>120</sup> The court may choose to terminate (get rid of) your disposition altogether, change your custody, suspend (temporarily hold) its decision to send you to detention or a mental hospital, remove certain conditions of your probation, or add more conditions to your probation.<sup>121</sup>

A Motion for Modification of Disposition may be filed by the government prosecutor, you, your parents, your custodian, a probation officer, or by the court itself.<sup>122</sup> If the motion asks for you to be placed in less restrictive conditions (conditions that give you more freedom), the court does not have to hold a hearing before agreeing. However, if the motion asks for you to be placed in more restrictive conditions (conditions that give you less freedom), the court must hold a hearing before agreeing.<sup>123</sup>

A Motion for Modification of Disposition may include facts about issues regarding your treatment or rehabilitation that did not come up during the original disposition. It may also include facts such as:

- 1) Your progress towards rehabilitation. If you have cooperated with and completed all rehabilitative services that are needed for your treatment, then your disposition should be changed to reflect this. If you have "availed [yourself] of every rehabilitative program available," one court has held that you are "entitled [have a right] to a modification of disposition."<sup>124</sup>
- 2) Abuse or other problems with the conditions you face in detention. The use of excessive (more than necessary) force or corporal (physical) punishment violates your due process rights under the Fourteenth Amendment to the United States Constitution. The Louisiana Children's Code also says that when a child is removed from his parent's control, the court must "secure for him care as nearly possible equivalent to that which the parents should have given him."<sup>125</sup> Your parents are not allowed to abuse you,<sup>126</sup> and neither is anyone at the facility where you are being held.

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<sup>115</sup> LA. CHILD. CODE ANN. art. 893(A) (2017).

<sup>116</sup> LA. CHILD. CODE ANN. art. 892 (2017).

<sup>117</sup> LA. CHILD. CODE ANN. art. 893(D) (2017); *see In re S.T.*, 97-0216, p. 3 (La. App. 1 Cir. 9/19/97); 699 So. 2d 1128, 1129 ("At a disposition hearing, if the court finds the child is in need of treatment or rehabilitation as a delinquent child, the court is required to immediately make any appropriate disposition authorized by . . . the Children's Code.").

<sup>118</sup> LA. CHILD. CODE ANN. art. 901(B) (2017).

<sup>119</sup> LA. CHILD. CODE ANN. art. 102 (2017); LA. CHILD. CODE ANN. art. 905 (2017); LA. CHILD. CODE ANN. art. 909 (2017).

<sup>120</sup> LA. CHILD. CODE ANN. art. 909 (2017) (The court does not have the authority to modify the disposition of certain felony-grade delinquent acts).

<sup>121</sup> LA. CHILD. CODE ANN. art. 909 (2017).

<sup>122</sup> LA. CHILD. CODE ANN. art. 910 (2017).

<sup>123</sup> LA. CHILD. CODE ANN. art. 910(D) (2017).

<sup>124</sup> *In re C.H.*, 2003-1279, p. 4 (La. App. 3 Cir. 1/28/04); 865 So. 2d 947, 950.

<sup>125</sup> LA. CHILD. CODE ANN. art. 102 (2017).

<sup>126</sup> LA. CHILD. CODE ANN. art. 102 (2017).



- 3) You are not receiving the rehabilitative treatment you need. It is the juvenile court's job to make sure that you are placed in an environment where you will get the services you need.
- 4) You could benefit from parole or other services to help you transition back into society before being released. One study found that that young people who spend a lot of their time "in the system" are especially in need of aftercare services, such as job placement and tutoring.<sup>127</sup>

### 13. Appeal

An appeal is when you ask a higher court to review certain parts of your case for legal mistakes. If the government did not follow the legal rules in your case, then you have the right to appeal in two ways. You can use the government's mistake to appeal your entire conviction. If your appeal works, then you may have your conviction overturned or erased. You can also challenge the mistake in order to get better living conditions. You can complain that you are not being treated fairly based on the rules that the government must follow for juveniles. If this challenge works, you may be able to switch to better living conditions or get into a new detention program. If possible, try to get a lawyer or an adult to assist you with any legal papers. You should talk to your lawyer about your options and the type of appeal that would be most likely to help you.

The most important part of your appeal is the way you describe the facts of your case. Especially in juvenile cases, judges have a lot of power and can make decisions "in the interests of justice" in ways they cannot for adults. For example, the judge may ignore any mistakes made by the government and refuse to overturn the conviction if the facts of your crime make you sound like a dangerous threat to the community. As a result, you should be very careful about how you talk about your crime and yourself, and help the judge understand any circumstances or facts that might work in your favor. You should never lie to a judge because this is a crime, but you do not need to draw attention to the most serious parts of your crime either. You need to show the judge that you have "rehabilitative potential." This means you have to show that you want to change your life and that you will not commit crimes in the future. A judge looking at your case will try to figure out which one is greater: your rehabilitative potential or the seriousness of your offense.

If you decide to file an appeal, you have the right to a lawyer.<sup>128</sup> Luckily, Louisiana law says that appeals involving juvenile delinquency must be handled quickly,<sup>129</sup> so an appeal can help you even if you have a short disposition.<sup>130</sup> In a delinquency case, an appeal may only happen after disposition.<sup>131</sup>

### 14. Post-conviction Relief

Like an appeal, a motion for post-conviction relief asks the court to review certain parts of your case for legal mistakes. However, a motion for post-conviction relief is filed with the juvenile court, not a criminal court or appeals court. If you succeed, your adjudication and disposition may be set aside.<sup>132</sup> However, you cannot ask for post-conviction relief if you can appeal the adjudication and disposition, or if you have an appeal pending (not yet complete).<sup>133</sup>

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<sup>127</sup> Metropolitan Crime Commission, *Juvenile Recidivism in Metropolitan New Orleans* 17–18, available at <http://www.laccr.org/wp-content/uploads/2016/04/Juv-Recid-Metro-NO-April-1999-3.pdf> (last visited Jan. 25, 2018).

<sup>128</sup> LA. CHILD. CODE ANN. art. 809 (2017).

<sup>129</sup> Procedures established by court rules to speed up the appeals process include denying the extension of a return date unless there is a showing of extraordinary circumstances (La. Ct. App. Unif. R. 5-3(a)), assigning cases "by preference to the next docket or cycle following any required briefing schedule," (La. Ct. App. Unif. R. 5-3(b)), and shortening briefing deadlines (La. Ct. App. Unif. R. 5-3(c)).

<sup>130</sup> See LA. CHILD. CODE ANN. art. 337 (2017) (delinquency appeals "shall be accorded preference in the court of appeal and shall be determined at the earliest practicable time").

<sup>131</sup> LA. CHILD. CODE ANN. art. 330(B) (2017).

<sup>132</sup> LA. CODE CRIM. PROC. ANN. art. 924(1) (2017).

<sup>133</sup> LA. CODE CRIM. PROC. ANN. art. 924.1 (2017).

The Louisiana Children's Code does not have any instructions on how to ask for post-conviction relief, but the Louisiana Code of Criminal Procedure does, and these instructions apply in delinquency cases.<sup>134</sup>

You may ask for post-conviction relief if<sup>135</sup>:

- 1) The conviction was won in a way that violated the Constitution of the United States or the state of Louisiana;
- 2) The court did not have jurisdiction (authority);
- 3) The conviction made you experience "double jeopardy";<sup>136</sup>
- 4) The law that created the offense for which you were convicted is unconstitutional;
- 5) The results of a DNA test prove that you are innocent; or
- 6) The prosecutor waited too long to bring a case against you.

### 15. **Expungement**

Records related to a delinquency case are confidential. However, some records are still kept by courts and other agencies. Under certain circumstances, these records can be given to you and to other people. In order to prevent this from happening, you can ask for your records to be expunged.

Expungement causes all your delinquency records to be erased and destroyed, which can help you put your past behind you and move on with your life. Even if the records have not affected you before, or you are not concerned about courts and other agencies having access to your records, it is probably a good idea to try to get your records expunged if you are eligible. This is because juvenile records can seriously impact your ability to go to college, get a job, and find housing. Expunging your records will give you a clean slate and make sure that people can only judge you based on who you are now rather than who you were when you committed a delinquent act.

You can ask the court to expunge your records at any time by filing a "Motion for Expungement and Sealing," which is a form, and explaining in the motion why you should have your records expunged.<sup>137</sup> Your motion must be filed with the court that has the records you are seeking to expunge, or with the court that has authority over the agency that arrested you.<sup>138</sup> Your motion must be served personally or by certified mail.<sup>139</sup> Unless both you and the court or agency agree to waive it, a hearing must happen. If the court finds that you are eligible, the court may order expungement.

Your records qualify for expungement if<sup>140</sup>:

- 1) They have to do with behavior that did not lead to an adjudication;
- 2) They have to do with to delinquency adjudications involving Louisiana Law R.S. 14:83.3, 14:83.4, 14:89, or 14:89.2;
- 3) They have to do with a finding of Families in Need of Services;
- 4) They have to do with an adjudication that was not for murder, manslaughter, an offense requiring registration as a sex offender, or armed robbery;
  - a. Once that adjudication has been dismissed or closed; and
  - b. If you have no pending charges in adult court, no adult court felony convictions, or adult court misdemeanor criminal convictions involving a firearm

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<sup>134</sup> LA. CHILD. CODE ANN. art. 803 (2017).

<sup>135</sup> LA. CODE CRIM. PROC. ANN. art. 930.3 (2017).

<sup>136</sup> You were tried on the same (or similar) charges in the same case after you were already found innocent or guilty. *Double Jeopardy*, Black's Law Dictionary (10th ed., 2014).

<sup>137</sup> LA. CHILD. CODE ANN. art. 917, 919B, 925 (2017). Previous versions of the Code said you could only ask the court to expunge your records after you turned 17, but that was changed in 2017.

<sup>138</sup> LA. CHILD. CODE ANN. art. 919(C) (2017).

<sup>139</sup> LA. CHILD. CODE ANN. art. 919(D) (2017).

<sup>140</sup> LA. CHILD. CODE ANN. art. 918 (2017).

- 5) They have to do with an adjudication for murder, manslaughter, a sex offense, kidnapping or armed robbery, if
  - a. It has been at least five years since your last juvenile case was closed or dismissed; and
  - b. You have no pending charges in adult court, no adult court felony convictions, or adult court misdemeanor criminal convictions involving a firearm.

## F. YOUR RIGHTS WHILE IN SECURE CARE

There are special rules when the government puts juveniles in detention or prison. This Section explains how these rules work, and what steps you can take to make your situation better, including requesting an administrative review procedure (“ARP”), and reporting your problem to Louisiana’s Department of Public Safety and Corrections (“DPSC”) Project Zero Tolerance system.

### 1. Constitutional Rights

#### a. Right to Rehabilitation

The Fourteenth Amendment to the United States Constitution says that when the purpose of incarcerating juveniles is for treatment and rehabilitation, you have a right to these things while you are in detention.<sup>141</sup> The Delinquency System in Louisiana is rehabilitative, which means that it focuses on teaching juvenile offenders to follow the law and improve their lives.<sup>142</sup> If you are not receiving the treatment and rehabilitation services you need, then this is a violation of your constitutional rights.

#### b. Humane Conditions of Confinement

If you are in the custody of the state, then you have the constitutional right to humane conditions of confinement. This means that you must get proper food, shelter, clothing, and medical care (discussed below).<sup>143</sup> If the conditions in the facility where you are being held are extremely bad, this could violate the Eighth Amendment of the United States Constitution.<sup>144</sup> For example, in one case, a court decided that filthy cells that exposed prisoners to serious health problems violated the Eighth Amendment, when the prison staff knew about it and did nothing.<sup>145</sup> In another case, a court decided that cells that had roaches, poor lighting, and leaking water and sewage violated the Eighth Amendment.<sup>146</sup>

#### c. Personal Safety and Protection from Harm

If you are a young person in the custody of the state, then you have a right to be free from physical violence according to the Fourteenth Amendment to the United States Constitution.<sup>147</sup> If you face violence from a guard at your prison or detention facility, this may also violate the Eighth Amendment.<sup>148</sup> In Louisiana, guards and other staff at prisons or detention facilities have a “duty to use reasonable care

<sup>141</sup> See *State ex. rel.* S.D., 2002-0672, p. 25 (La. App. 4 Cir. 11/06/02); 832 So. 2d 415, 433–434 (“The Due Process Clause of the Fourteenth Amendment to the United States Constitution ‘requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.’”).

<sup>142</sup> See *State ex. rel.* S.D., 2002-0672, p. 25 (La. App. 4 Cir. 11/06/02); 832 So. 2d 415, 433 (observing that “the purpose of incarcerating juveniles . . . is treatment and rehabilitation, due process requires that the conditions and programs . . . must be reasonably related to that purpose.”).

<sup>143</sup> *Del A. v. Roemer*, 777 F. Supp. 1297, 1318 (E.D. La. 1991) (“Because the State has established a custodial relationship with plaintiffs, they have a right to adequate food, shelter, clothing, and medical care.”).

<sup>144</sup> *Palmer v. Johnson*, 193 F.3d 346, 351–352 (5th Cir. 1999).

<sup>145</sup> *Gates v. Cook*, 376 F.3d 323, 338 (5th Cir. 2004).

<sup>146</sup> See *McCord v. Maggio*, 927 F.2d 844, 846–847 (5th Cir. 1991).

<sup>147</sup> See *State ex. rel.* S.D., 2002-0672, pp. 25–26 (La. App. 4 Cir. 11/06/02); 832 So. 2d 415, 434 (finding a violation of the Fourteenth amendment when juvenile prisoner was punched, resulting in broken jaw). *S.D.* cites multiple cases where courts “condemned the use of force or corporal punishment against children in correctional facilities,” including the following: *Nelson v. Heyne*, 355 F. Supp. 451, 454–455 (N.D. Ind. 1972) (beatings with a paddle); *Morales v. Turman*, 383 F. Supp. 53, 72–75 (E.D. Tex. 1974) (physical beatings and use of tear gas); *Milonas v. Williams*, 691 F.2d 931, 942 (10th Cir. 1982) (grabbing children by the hair, pulling them backward and flinging them against walls).

<sup>148</sup> *K.M. v. Ala. Dep’t. of Youth Servs.*, 360 F. Supp. 2d 1253, 1259 (11th Cir. 2005).

to protect inmates from harm,”<sup>149</sup> (meaning they must use the same amount of care as any reasonable person would). In order to violate the Eight Amendment, a guard or other staff at a prison or detention facility must know that there is a great risk that you may be seriously harmed and ignore it.<sup>150</sup> If you are facing violence at your detention facility, *see* Section F(4)(c) below on Project Zero Tolerance.

#### d. Medical and Mental Health Care

The state must have what is called a “minimally adequate” mental health treatment system in place in all juvenile detention facilities.<sup>151</sup> This means that the facility must have staff who are trained, and who offer services like emergency mental health services, evaluation and creation of a treatment plan, follow-up evaluations, and regular mental health services, including counseling.<sup>152</sup>

A juvenile detention center could get in legal trouble if it does not provide enough services or services that are good enough to meet the needs of juveniles with mental or physical health problems.<sup>153</sup>

## 2. Education Rights

If you are in the custody of the state, you should be getting an education.<sup>154</sup> It is the Deputy Secretary of Youth Services’ policy to provide complete year-round educational and vocational (career-oriented) programs which are appropriate for youth in secure care facilities. The Office of Juvenile Justice of Louisiana has its own policies about what kind of education juveniles in secure facilities must receive, and the directors of each facility are responsible for making sure that the policies are followed.<sup>155</sup> The current policies say that you have the right to the following things while you are in secure care<sup>156</sup>:

- 1) An initial screening and educational test to figure out your educational needs. The test that you will have to take is called the Test of Adult Basic Education (TABE), and it is given during the admission process, before you enroll in school, every 3-6 months after that as needed, and/or when you leave the program. TABE is designed to test your reading, language and math skills.
- 2) An Individualized Learning Plan (ILP) that is developed when you are admitted, and includes
  - a. TABE results
  - b. Education needs
  - c. Your academic areas of strength and weakness
  - d. What accommodations (supports) you need to help you learn
  - e. Goals for what you should be achieving academically
- 3) Placement in your appropriate grade level, based on your age, the last grade you were in, your school and test history, and the results of your TABE test.
- 4) Transitional education placement, if you are two or more grade levels behind. Transitional education is a one-year process where students who are behind get extra help so that they can earn a high school diploma, HiSET, or State-approved Skills Certificate.
- 5) The opportunity to enter the program at your level and move through it at your pace.
- 6) Enough classroom space, and classroom space that encourages teaching and learning.
- 7) Enough materials and equipment to make sure you are able to keep up with the curriculum.

<sup>149</sup> *Conerly v. State*, 2002-1852, p. 9 (La. App. 1 Cir. 6/27/03); 858 So. 2d 636, 645.

<sup>150</sup> *Adames v. Perez*, 331 F.3d 508, 512 (5th Cir. 2003).

<sup>151</sup> *State ex. rel. S.D.*, 2002-0672, p. 26 (La. App. 4 Cir. 11/06/02); 832 So. 2d 415, 434.

<sup>152</sup> *Gary W. v. Louisiana*, 437 F. Supp. 1209, 1219 (E.D. La. 1976) (requiring individualized assessments and treatment programs for mentally retarded, physically handicapped, and delinquent children in custody of state).

<sup>153</sup> *A.M. ex rel. J.M.K. v. Luzerne County Juvenile Det. Ctr.*, 372 F.3d 572, 584–585 (3d Cir. 2004).

<sup>154</sup> *State ex. rel. S.D.*, 2002-0672, p. 26 (La. App. 4 Cir. 11/06/02); 832 So. 2d 415, 434 (“[J]uveniles in correctional facilities have a federal constitutional right to an adequate educational program.”).

<sup>155</sup> Office of Juvenile Justice Youth Services Policy No. B.7.1, *available at* <https://ojj.la.gov/wp-content/uploads/2017/03/B.7.1.pdf> (last visited Oct. 8, 2017).

<sup>156</sup> Office of Juvenile Justice Youth Services Policy No. B.7.1(VI), *available at* <https://ojj.la.gov/wp-content/uploads/2017/03/B.7.1.pdf> (last visited Oct. 8, 2017).

- 8) Library services that meet Louisiana Secondary Library Standards. This includes books that reflect the different reading levels, languages, interests, and ethnicities of the young people housed at the facility. Library materials must be provided to you as needed for your homework or pleasure reading.
- 9) Vocational (career and technical) education programs.
- 10) Mandatory school attendance requirements. Your work assignments, visitation, counseling, and other programs should not interfere with your school attendance.

a. Special Education Rights

If you are diagnosed with a disability, you are entitled to a free appropriate public education (“FAPE”), even while you are incarcerated.<sup>157</sup> You can request a review if your Individualized Education Program (“IEP”) is not being followed. If your IEP is not being followed or you are not getting FAPE, then you first must try to resolve your problem through administrative methods (contact the state Department of Education to find out more about administrative remedies) and, if that fails, through state court.<sup>158</sup> You can sue in federal court if you have gone through all the administrative and state remedies or if the administrative and state remedies fail.<sup>159</sup> The only reason your FAPE can be denied is for prison security. Students and parents also have the right to challenge any changes made to an IEP.

The Louisiana Department of Education has created an educational agency known as Special School District (“SSD”), which has control over all students with disabilities enrolled in residential facilities operated by the Department of Health and Hospitals (“DHH”) or Office of Juvenile Justice (“OJJ”) and certain private juvenile detention facilities.<sup>160</sup> If this applies to you, there are special services and schools that you may be eligible for.

**3. Right to be Housed Separately from Adults**

If your case has not been transferred to adult criminal court, you may still be taken to an adult facility for identification, processing, or to wait for transportation. Depending on the circumstances, you can be held there for up to 24 hours.<sup>161</sup> While you are in an adult facility, the sheriff or person in charge of the facility must make sure that you are supervised, and that you have “sight and sound” separation from the adults housed in the same facility.<sup>162</sup> That means you should not be able to clearly see or talk directly to any adult prisoner in the prison from where you are in the prison.

If you are a juvenile whose case was transferred to the adult criminal court, (see Section E(6) on transfer), then you may be taken to any of the following adult facilities<sup>163</sup>:

- 1) Adult Reception and Diagnostic Center (ARDC)
- 2) Elayn Hunt Correctional Center (EHCC)
- 3) Wade Reception and Diagnostic Center (WRDC)
- 4) David Wade Correctional Center (DWCC)
- 5) Louisiana Correctional Institute for Women (LCIW)

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<sup>157</sup> 20 U.S.C. § 1412 (a)(3)(A) (2012); *see also* Handberry v. Thompson, 446 F.3d 335, 347 (2d Cir. 2006) (holding that the Individuals with Disabilities Education Act requires that states identify all children with disabilities and meet their needs).

<sup>158</sup> Handberry v. Thompson, 446 F.3d 335, 341–344 (2d Cir. 2006).

<sup>159</sup> Handberry v. Thompson, 446 F.3d 335, 343 (2d Cir. 2006).

<sup>160</sup> Special School District, *available at* <http://www.louisianabelieves.com/schools/special-school-district> (last visited Dec. 28, 2017).

<sup>161</sup> LA. CHILD. CODE ANN. art. 306(B) (2017).

<sup>162</sup> LA. CHILD. CODE ANN. art. 306(B) (2017).

<sup>163</sup> LA. ADMIN. CODE tit. 22, pt. I, § 709(D) (2017).

If you are housed in one of the facilities above, you will participate in the same work, education, and other rehabilitative programs as adults, and will have to follow the same classification (grouping) and disciplinary (what happens if you break the rules) processes as adults. Security supervision and security rules will also be the same for you as for the adult inmates housed in your facility.<sup>164</sup>

#### 4. What to Do if Your Rights in Secure Care are Violated

##### a. Administrative Remedy Procedure

If you are in the custody of the Office of Juvenile Justice (“OJJ”), then you may file a grievance (complaint) about the conditions you are facing.<sup>165</sup> This grievance is called an Administrative Remedy Procedure (“ARP”) and the rules you must follow when filing one can be found in the Louisiana Administrative Code and in internal policies and procedures of OJJ.<sup>166</sup> While you can file an ARP by yourself, you may want to get your lawyer’s help. Your lawyer can make sure that your ARP follows all the proper rules so that you can ask a court to review the outcome of your ARP later on if your need to.

You must file an ARP within 90 days of whatever incident you are complaining about, and you can get an ARP complaint form at any OJJ facility.<sup>167</sup> However, you do not have to fill out any special form to file an ARP. Your ARP can be written on any type of paper and only needs to include<sup>168</sup>:

- 1) The phrase “this is an ARP”;
- 2) A description of the problem; and
- 3) What you would like the OJJ to do about it.

Your complaint may be rejected if it is not filed within 90 days, or if it does not follow the rules above.<sup>169</sup>

Give your ARP complaint to the ARP coordinator.<sup>170</sup> If your ARP is accepted, the director of your facility has 21 days to answer it.<sup>171</sup> If your ARP is rejected, you have 10 days to appeal this rejection by filing a Step Two Review Request (“STRR”). You should give your STRR to your case manager or put it in the designated collection location for the ARP coordinator to pick it up.<sup>172</sup> The final decision on your STRR will be mailed from the Office of Youth Development within 21 calendar days after the Office received your appeal.<sup>173</sup>

##### b. Judicial Review

If you are not happy with the outcome of your STRR, you may ask the juvenile court to review the OJJ’s denial of your complaint.<sup>174</sup> This is called judicial review. You must ask for judicial review within 30 days from the day that you get the decision denying your Step Two appeal.<sup>175</sup> You may ask for judicial review with or without the help of your lawyer. If you decide to represent yourself, you can write a letter to the court describing what was in your complaint, and the steps you took to solve your problem through the ARP system.<sup>176</sup> If your lawyer is representing you, he must file a formal petition with the court.<sup>177</sup> If

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<sup>164</sup> LA. ADMIN. CODE tit. 22, pt. I, § 709(D)(5) (2017).

<sup>165</sup> LA. CHILD. CODE ANN. art. 912(A) (2017).

<sup>166</sup> LA. ADMIN. CODE tit. 22, pt. I, § 713 (2017).

<sup>167</sup> LA. ADMIN. CODE tit. 22, pt. I, § 713(E)(3)(b) (2017).

<sup>168</sup> LA. ADMIN. CODE tit. 22, pt. I, §§ 713(E)(3)(a), (c) (2017).

<sup>169</sup> LA. ADMIN. CODE tit. 22, pt. I, § 713(G)(3) (2017).

<sup>170</sup> LA. ADMIN. CODE tit. 22, pt. I, § 713(E)(3) (2017).

<sup>171</sup> LA. ADMIN. CODE tit. 22, pt. I, § 713(F)(6) (2017).

<sup>172</sup> LA. ADMIN. CODE tit. 22, pt. I, § 713(G)(1) (2017).

<sup>173</sup> LA. ADMIN. CODE tit. 22, pt. I, § 713(G)(3) (2017).

<sup>174</sup> LA. CHILD. CODE ANN. art. 912(B) (2017).

<sup>175</sup> LA. ADMIN. CODE tit. 22, pt. I, § 713(H)(1) (2017); LA. CHILD. CODE ANN. art. 912(C) (2017).

<sup>176</sup> LA. CHILD. CODE ANN. art. 912(C) (2017).

<sup>177</sup> LA. CHILD. CODE ANN. art. 912(C) (2017).

the court agrees that you did everything you could do to resolve the problem within the ARP system, and that your complaint is valid, then the court will hold a hearing to try to solve your problem.<sup>178</sup>

c. Project Zero Tolerance

In 1996, the State of Louisiana created the Project Zero Tolerance (“PZT”) system. The system is used to look into and respond to all claims of abuse against juveniles in Louisiana’s juvenile secure care facilities. Every juvenile secure care facility in Louisiana has a PZT investigation staff. If you are being abused, either by staff or by other youth in your facility, you can make a report to PZT by calling the PZT hotline (1-800-626-1430) from whatever telephone is available to you. You can also ask a parent or other person to call the hotline for you. When PZT receives a report of abuse or violence, it must investigate and write up a report. A PZT investigation may involve interviewing you and others, watching video surveillance tapes, and reading any documents related to the incident. When its investigation is over, PZT will decide whether your claims are true or not.

d. The Prison Rape Elimination Act

In 2003, the federal government passed the Prison Rape Elimination Act (PREA), the first federal law dealing with sexual assault in prisons. PREA defines “prison” as “any federal, state, or local confinement facility, including local jails, police lockups, juvenile facilities, and state and federal prisons.” Short-term lockups, such as holding facilities, and local jails, even if they are small, are also subject to PREA’s rules. The goal of the law is to prevent, detect, and respond to sexual abuse in facilities where people are incarcerated. According to PREA, there are several things your juvenile facility must do to meet this goal:

- 1) It must provide multiple internal ways for you to privately report sexual abuse and sexual harassment, retaliation (revenge) by other residents or staff for reporting sexual abuse and sexual harassment, and staff neglect or violation of responsibilities that may have led to this abuse or harassment.<sup>179</sup>
- 2) It must provide at least one way for you to report abuse or harassment to a public or private entity or office that is not part of the facility.<sup>180</sup>
- 3) It cannot make you use an informal grievance process (such as the ARP process mentioned above) to deal with an event involving sexual abuse.<sup>181</sup>
- 4) It must make sure that you don’t have to submit your complaint to the person you are accusing of abusing you.<sup>182</sup>
- 5) It must make a final decision on your complaint within 90 days after you submit it.<sup>183</sup>
- 6) If you or someone else makes a complaint that says you may be in serious risk of imminent (soon to happen) sexual abuse, then your facility must forward your complaint to someone who can take quick action, must provide a first response within 48 hours, and must provide a final response within 5 days.<sup>184</sup>

For more information about PREA and how it can help you, please see Chapter 24 of the main *JLM*, “Your Right to Be Free from Assault by Prison Guards and Other Prisoners.”

e. 42 U.S.C. § 1983 Claims

If you think that officials at your facility have violated your Eighth Amendment rights, you may sue the officials or guards using Section 1983 of Title 42 of the United States Code (42 U.S.C. § 1983). Section 1983 is a federal law that allows you to sue state officials who have violated your constitutional

<sup>178</sup> LA. CHILD. CODE ANN. art. 912(D) (2017).

<sup>179</sup> 28 C.F.R. § 115.51(a) (2017).

<sup>180</sup> 28 C.F.R. § 115.51(b) (2017).

<sup>181</sup> 28 C.F.R. § 115.52(b)(3) (2017).

<sup>182</sup> 28 C.F.R. § 115.52(c)(1) (2017).

<sup>183</sup> 28 C.F.R. § 115.52(d)(1) (2017).

<sup>184</sup> 28 C.F.R. § 115.52(f)(2) (2017).

rights while acting “under color of any” state law.<sup>185</sup> You can sue federal officials in a similar suit, called a *Bivens* action.<sup>186</sup> You can also use Section 1983 to sue local officials as long as you can show that they too acted under “color of state law.” (You may be able to sue local officials under state tort law as well.) But note that you can only sue municipalities (towns, cities, or counties) under Section 1983 if your injury was the result of an official municipal policy or custom.<sup>187</sup> In other words, a local government will be held liable (at fault) only if an injury can be shown to be a direct result of the local government’s official policy. Therefore, a local government is not liable under Section 1983 “for an injury inflicted solely by its employees or agents”<sup>188</sup> who were not following official local policy or custom, even though the local officials may be individually liable under Section 1983.

You should read Chapter 16 of the main *JLM*, “Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law,” to learn more about Section 1983 claims. Part E of Chapter 16 of the main *JLM* explains *Bivens* actions and Part C gives more information on qualified immunity.

#### f. Other Options

There are several other steps you can take to try to fix problems you are facing with the conditions of your detention. You can ask for a modification of disposition (mentioned above) by explaining to the court why your rights in secure detention are being violated. After you have done everything you can under the ARP system, you can also take action in federal or state court asking for money or for an injunction (an order that will force your caretakers to provide you with better treatment). For more information on how to do this, *see* Chapter 16 of the main *JLM*.

### G. CONCLUSION

If you are a juvenile, federal laws and Louisiana state laws give you various rights and protections with respect to the legal process and the conditions of your detention. To receive these protections, you must first make sure you fit the eligibility requirements described above. Then, speak with your lawyer about the next steps to take, including a possible appeal of your case or bringing a separate lawsuit if your rights have been violated.

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<sup>185</sup> 42 U.S.C. § 1983 (2012).

<sup>186</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397, 91 S. Ct. 1999, 2005, 29 L. Ed. 2d 619, 627 (1971).

<sup>187</sup> *See, e.g., Williams v. Kaufman County*, 352 F.3d 994, 1013–1014 (5th Cir. 2003) (holding a county could be held liable for unlawful searches of detainees when the relevant policymaker, in this case the sheriff, authorized the policy).

<sup>188</sup> *Irwin v. City of Hemet*, 22 Cal. App. 4th 507, 525, 27 Cal. Rptr. 2d 433, 442 (Cal. Ct. App. 1994) (quoting *Monell v. Dep’t. of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037–2038, 56 L. Ed. 2d 611, 694 (1978)).



## APPENDIX A

### GLOSSARY OF LEGAL TERMS

***Adjudication***

This is what they call a trial in juvenile court. It is the court hearing where the district attorney's office must try to prove the minor committed the acts he or she is accused of.

***Answer***

A court hearing after the petition has been filed, where the juvenile may admit to all the claims the district attorneys has made, or deny them. If the juvenile denies committing these acts, the case will be set for an adjudication hearing.

***Appeal***

When a person asks a higher court to review the decision made in his case by a lower court with the hope that the higher court will find mistakes and overturn that decision.

***Child***

In delinquency cases, a child is someone younger than 21 who commits a delinquent act before turning 17 years old.

***Competency***

Before a juvenile can be adjudicated for an offense, the juvenile must be able to understand the process and be able to help their attorney at the adjudication hearing. If it is determined that the juvenile cannot—either because of mental illness or developmental disability—the child is found to be incompetent or not competent. The court will then decide if the juvenile can be found competent or restored to competency after classes, or if they are permanently incompetent.

***Continued Custody Hearing***

If a juvenile is taken into custody, much like when an adult is arrested, instead of being released back to their parents, a hearing must be held within three days. This hearing is the continued custody hearing.

***Delinquent Act***

A delinquent act is an offense that would be a crime if committed by an adult.

***Disposition***

Similar to sentencing in adult court, the judge will decide at disposition what sort of treatment, supervision, or rehabilitation the child needs, such as community service, restitution, probation, or placement in secure care.

***Diversion***

Program run by the district attorney as an alternative to being prosecuted in juvenile court. If the juvenile successfully completes diversion, they are not adjudicated for that offense and the case against them is dismissed.

***Drug Court***

A program within the juvenile court system designed for juveniles who are substance abusers. Juveniles in the program are supervised by probation officers, have frequent testing to see if they're using alcohol/drugs, and have many weekly court hearings before the Drug Court Judge.

***Expungement***

Process to have the records of an arrest or a finding of delinquency destroyed. If your record is "expunged," no record of ever having been involved with the juvenile court system will exist.

***Felony grade delinquent act***

An act that would be a felony if it were committed by an adult. An act is a felony for an adult if it could be punished by hard labor, that is, by being sent to a state prison. Youth cannot be punished at hard labor, but it is still sometimes important to know whether an act is felony-grade or misdemeanor-grade.

***Jurisdiction***

Jurisdiction has two separate definitions. First, it is the power of a court to decide a case. If a court has the power to decide your case, we say the court has “jurisdiction.” Second, it is a geographic area in which a court may exercise its power to decide a case. For example, New York and New Jersey are different “jurisdictions” because New York courts only have authority to decide cases brought in New York.

***Misdemeanor grade delinquent act***

An act that would be a misdemeanor if it were committed by an adult. An act is a misdemeanor if it is not a felony, that is, if it cannot be punished by hard labor for an adult.

***Parole***

If a juvenile has been sentenced to secure care, such as a detention facility, that juvenile may be allowed to be released earlier than the period of time ordered. The Department of Safety and Corrections Office of Juvenile Justice makes the decision as to whether a juvenile may be paroled.

***Petition***

A written request filed in Court by the district attorney’s office that claims a juvenile committed misdemeanor or felony grade acts and asks the Court to hear the case and make a decision.

***Probation***

A youth can be given probation as a disposition—that’s like a “sentence”—after he or she is adjudicated delinquent. Probation usually means that the youth has to follow rules that the judges makes, but gets to live at home.

***Prosecutor***

The attorney who works for the state or federal government who is in charge of preparing the case against you. Prosecutors usually work for the District Attorney in the state system or the U.S. Attorney in the federal system. Your lawyer and/or parent/guardian should be with you whenever you speak to the prosecutor. You have a right to have your lawyer present to help.